INTRODUCTION

TO

ROMAN LAW.

IN TWELVE ACADEMICAL LECTURES.

BY

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NEW YORK:
D. APPLETON AND COMPANY,
549 & 551 BROADWAY.
1873.

PREFACE.

THE late Professor Hadley held a very high place in the judgment of American scholars. As a Greek scholar, and as a student of comparative philology, no one was more respected. But he was a man who did not confine himself closely to one line of study, and quite a number of years ago he conceived a desire to make himself acquainted with Roman law. For some time he had classes in the Institutions of Justinian, and in the progress of his study was led into the deeper recesses of his subject. When he began to prepare the lectures which are herewith given to the public, I am unable to determine with accuracy; but he must have put them into some form as many as ten years since. These lectures, or a part of them, were several times read to the senior undergraduates of Yale College, a short time before their examination for the degree of Bachelor of Arts; they were also more than

once delivered to the students in the law department; and once they formed a part of the graduate course at Harvard, where, I am assured, they were exceedingly well received.

The success which these lectures met with seems to have suggested to Professor Hadley their publication. At least after his death, November 14, 1872, his manuscript gave indications of such a plan. It was written out in that very minute, yet clear and beautiful, handwriting of his, the very sight of which gave pleasure, with scarcely an erasure or interlineation. The whole subject lay as in sunlight before his mind, as he began to write, and, having probably made more than one copy of his lectures, he had almost nothing in style, method, or choice of material, to alter.

Professor Hadley had qualities of mind remarkably well fitted for such an exposition of Roman law as these lectures contain. In all his work as a college man and as a writer, in his conversation even, he ever showed uncommon clearness, beauty of method, power of expressing the exact idea in appropriate words, a certain joyousness in communicating knowledge, and a simplicity of purpose, which looked away from himself. No man I have known was more adapted by Nature to be an instructor; he excelled in the mathemati-

cal sciences, so that at one time he was urged to take a professorship of them, while his Greek studies added elegance to his style of exposition.

The author of this preface was intrusted with the office of carrying these lectures through the press. They were so completely ready, that hardly an expression or even a word needed correction, and so plainly written that the printer could have no excuse for mistaking a letter. As calculated to initiate young students into the mysteries of Roman law, to diffuse a just idea of its preciseness of definition, and to broaden the foundation of legal study, they seem to me to possess peculiar merit.

The index to this volume was prepared by Prof. Albert S. Wheeler, late of Cornell University.

THEODORE D. WOOLSEY.

NEW HAVEN, *May* 1, 1873.

CONTENTS.

THE ROMAN LAW.

LECTURE I.

THE CORPUS JURIS CIVILIS.

THE CORPUS JURIS CIVILIS represents the Roman law in the form which it assumed at the close of the ancient period (a thousand years after the decemviral legislation of the Twelve Tables), and through which mainly it has acted upon modern times. It was compiled in the Eastern Roman Empire (the Western ceased in 476 A. D.), under the Emperor Justinian (controversies as to his character), who reigned 527–565 A. D.

The plan of the work, as laid out by Tribonian, included two principal parts, to be made from the constitutions of the Roman emperors, and from the treatises of the Roman lawyers. The *constitutiones* (law-utterances) of the emperors consisted of—1. *Orationes*, proposals of law, submitted to and adopted by the Senate; 2. *Edicta*, laws issued directly by the emperor as head of the state; 3. *Mandata*, instructions addressed by the emperor to high officers of law and justice; 4. *Decreta*, decisions given by the emperor in cases brought before him by appeal or otherwise; 5. *Rescripta*, answers returned by the emperor when consulted on questions of law by parties in a suit or by magistrates. Codes made up of imperial constitutions, selected and arranged, had been produced before, especially the Theodosian Code in the fifth century. The new CODEX CONSTITUTIONUM, prepared in little more than a year, was published in April, 529.

The next work was to digest the treatises of the most eminent law writers. Thirty-nine were selected, nearly all of whom lived between 100 B. C. and 250 A. D. Their books (2,000 in number) were divided among a body of collaborators (sixteen besides Tribonian), each of whom from the books assigned to him extracted what he thought proper, making the necessary changes (as to which Justinian had issued a number of *decisiones*

for their guidance), and putting the extracts (9,000 in all) under an arranged series of heads. The DIGEST (or PANDECTS), thus produced by three years' labor, was issued in November, 533. It was divided into fifty books, and each book into several titles. About a third part comes from the jurist Ulpian (died 228), a sixth from his contemporary Julius Paulus, a twelfth from Papinian (died 212), etc. The Digest is the longest component of the Corpus Juris, and much the most important, from the nature and variety of its contents, showing the spirit of the law, and giving illustrations of juristic reasonings and methods.

To bring the *Codex Constitutionum* into better conformity with the Digest, it was revised in 534, and issued as we now have it in November of that year. It was divided into twelve books, and these into titles, with the same general arrangement as the Digest. Yet it contains some topics which do not appear in the Digest, especially all those connected with Christianity and the church. In general, it contains much more of public law than the Digest; and the superior importance of the latter is partly due to this fact, it being the private, not the public, law of Rome which has obtained currency in modern Europe.

The Corpus Juris includes also an elementary text-book, the INSTITUTIONES (founded on the *institutiones* of Gaius, who flourished about 150, and whose works furnished many extracts to the Digest). It was prepared by Tribonian, Theophilus, and Dorotheus, and was issued with the Digest in 533. Subjects of its four books.

The Institutes, Digest, and Codex, were given, as a complete *body of law*, to the law-schools at Constantinople, Rome, Berytus, Alexandria, Cæsarea, to be studied in their five years' curriculum. In the courts it was to supersede all earlier authorities. No abbreviations were to be used in copying it. No commentaries were to be written on it (only translations into Greek, and summaries of its contents), lest they should give rise to controversies: futility of the prohibition.

Later statutes of Justinian, arranged in order of time, form the NOVELS (*novellae constitutiones*, most of them in Greek), the last component of the Corpus Juris.

The whole Corpus Juris too good for the age in which it appeared. Superseded in the Eastern Empire by paraphrases, abridgments, and later compilations. Its influence for several centuries confined to some parts and cities of Italy.

THE subject, on which I am to give you a few lectures, is the Civil Law—the Roman Law—its History

and System. My desire, of course, is to give you all the information I can, in the very scanty time allowed to us. But I shall try to remember that you are hearers only, not readers; and that I must not pack the matter too closely; that I must avoid at once a brevity of statement which you would find unintelligible, and a multiplicity of details which you would find confusing and wearisome. The subject involves, almost of necessity, a good deal that is technical and dry: I could hardly expect that my lectures would receive place in a "Library of Entertaining Knowledge." My reliance must be on the interest and importance of the theme itself, rather than on any attraction which I can hope to give it by my mode of treatment. That it has importance and interest, to the student of history and the man of liberal culture as well as to the expectant lawyer, will, I hope, be apparent as we proceed; I shall not try to prove it now.

The first object to which I call your attention is the great law-book, the "Corpus Juris Civilis," in which the Roman law was embodied at the close of the ancient period, and through which mainly it has exercised its influence upon later ages. The Roman law has, indeed, a previous history of great length and great importance; it can be traced with more or less distinctness from the decemviral code of the Twelve Tables, four centuries and a half before Christ, to the compilation of the Corpus Juris in the reign of the

Emperor Justinian, more than five centuries after Christ. Through this long period of nearly a thousand years, the Roman law was in a constant process of change and development. The alterations it underwent were never violent or revolutionary; they proceeded from point to point, with a slow, natural, and steady progress; but they amounted, in the course of centuries, to extensive and radical transformations of the system. The Corpus Juris Civilis represents only one phase, the latest phase, of this long development. It has, however, a preëminent importance, because the rules and principles of the law were then reduced to the form of a system, condensed, digested, and complete, in which they were best fitted to influence the mind and mould the institutions of modern Europe. The Corpus Juris is a product of the Eastern Roman Empire: the Western had ceased to exist, even in name, a half-century before the accession of Justinian. Germanic tribes were established as conquerors and sovereigns in all the provinces of the West: the Angles and Saxons in Britain, the Franks and Burgundians in Gaul, the Visigoths in Spain, the Ostrogoths in Italy, the Vandals in Northern Africa. Justinian, afterward, by the arms of his great generals, Belisarius and Narses, crushed the power of the Vandals and the Ostrogoths, and brought Africa and Italy into a precarious and transient connection with his empire. But Justinian himself was a barbarian; a man of Slavonic birth, he reigned over a

people who spoke Greek and called themselves Romans, to whom he issued a Latin law-book which few of them could either read or understand. The character of Justinian has been the subject of earnest controversy. He has been extolled as a model of excellence, a prince of extraordinary justice, knowledge, and sagacity; and he has been decried as a prodigy of baseness, as weak, ignorant, covetous, corrupt, and profligate. It is curious that both these views have come down to us from one author, the historian Procopius, a contemporary of Justinian, the principal authority for the events of his life and reign. His histories of the Persian War, the war with the Vandals, the Gothic War, etc., are full of the praises of the emperor. But in another work, known by the name of "Historia Arcana," and containing a scandalous record of the court of Constantinople, he paints both Justinian himself and his empress Theodora in the blackest colors. A more remarkable case of blowing hot and cold from the same mouth, at the same object, it would be hard to find in the annals of literature. It is probable that both representations, the panegyrical and the vituperative, are caricatures of the real man. It is clear that Justinian had his faults, conspicuous among which were vanity, jealousy, and greed; but he was not worse than the majority of those who preceded and followed him on the Byzantine throne. As to his talents, it is evident that he had the capacity of conceiving large things, of planning and

undertaking "enterprises of great pith and moment;" and he had also the art, which many princes equally ambitious do not have, of finding the ablest men of his time to serve in carrying out his enterprises. Of his generals, Belisarius and Narses, we have just spoken; but he was no less fortunate in his great law-minister, Tribonian. The Corpus Juris is an enduring monument of the capacity and energy of the great lawyer who bore the foremost part in its construction.

Justinian came to the imperial throne at the mature age of forty-five, in the year 527. A few months later, in the year 528, he entered upon the work of collecting, revising, and systematizing, the whole body of the Roman law. This work, under the guidance of Tribonian, was divided into two principal parts, according to the materials of which the new book was to be composed. These were, first, the constitutions of the Roman emperors; and, second, the treatises of the Roman lawyers. The name *constitutiones*, applied to the law-making utterances of the Roman emperors, had a very different meaning from our word "constitution," used to denote the fundamental, organic law of the state. Every official public document issuing from the emperor, and creating, declaring, or modifying law, was a *constitutio*. It is a general term including documents of several different kinds: thus—1. *Orationes*, or proposals of laws submitted to the Senate for their action, the submission being a mere form, as the Senate, of course, ratified

what the emperor proposed; 2. *Edicta*, laws which the emperor himself put forth, in his character as highest magistrate, without invoking the authority of the Senate; 3. *Mandata*, directions addressed by the emperor to the prefect of the city, or the prefect of the praetorium, or to his legates in the provinces, or to other officers invested with jurisdiction, instructing them in reference to the administration of law and justice; 4. *Decreta*, decisions given by the emperor in law-cases which were brought before him, by appeal or by petition, for his investigation and judgment; and—5. *Rescripta*, answers returned by the emperor, when consulted on questions of law, either by the parties in some controversy, or, more commonly, by officers charged with the administration of justice in Italy or the provinces. All these various utterances are included in the term *constitutiones;* and it is hardly necessary to say that, although professing to come from the person of the emperor, they were actually composed by jurists, and usually by those who stood first in their profession. Of course, the number issued during five centuries of imperial dominion must have been very large. Three or four collections had already been made, in which the most important constitutions were selected from the mass, presented in a condensed form, and arranged according to their subjects. The last and most elaborate of these collections was the Theodosian Code, compiled about a century before the accession of Jus-

tinian; it is still in great part extant, and, next to the Corpus Juris Civilis (though *proximus longo intervallo*), is the most extensive monument of the Roman law. It was the first object of Tribonian, in carrying out the proposed reconstruction of the law, to prepare a new collection of imperial constitutions, selected, abridged, revised, and systematized, on the same general plan as the Theodosian Code: this latter code and the others which preceded it, were freely used in making the new compilation. By these helps, in addition to their own energy, the compilers were able to push on their task with such rapidity, that the work was completed and issued with imperial sanction in April, 529, a little more than a year from the time of its inception.

But the second task, which they had yet to accomplish, was one of much greater difficulty—to prepare a digest of the treatises of the most distinguished writers on law. The literature which they had to examine was of very considerable extent. The works to be digested were by thirty-nine authors, and consisted of about 2,000 books, in the Roman sense, according to which Caesar's "Gallic War" would be reckoned, not as one book, but as eight books. It was, moreover, even in the time of Justinian, an ancient literature. Of the thirty-nine authors, the most important belonged to a period from three to four centuries before Justinian; only two of them were more recent than three centuries before; while the

earliest of the number, Q. Mucius Scaevola, an older contemporary of Cicero, flourished fully six centuries before Justinian. In this long interval, the Roman law had undergone extensive changes, so that much of the contents of these works had become obsolete, and only by considerable alteration could be adapted to the present condition of the law. To guide the compilers in making the required alterations, a series of imperial ordinances was put forth, under the name of *decisiones*, making out the precise features of the new law, in distinction from the antiquated elements of the earlier system. In these preliminary labors, some time was consumed, and it was not until the close of the year 530, that the preparation of the digest itself was entered on. In this work, Tribonian had the aid of sixteen associates, among whom were four law-professors from the law-schools of Constantinople and Berytus. The books to be examined were divided up among the collaborators. Each one, as he read those assigned to him, was to excerpt such passages as seemed to him deserving of insertion, making the necessary alterations in them, and arranging them under a prescribed series of titles. When this process was finished, the collections were to be brought together, and incorporated into one work, with such further rejections, additions, and alterations, as should reduce them to a harmonious system. The plan was accomplished in about three years, a space of time surprisingly small, when we consider the amount

of work to be done, and the general thoroughness with which it appears to have been executed. There are found, indeed, a number of oversights: a few passages occur in places where they could only have been put by mistake; a few are inserted in more than one place, without occasion for the repetition; a few are in irreconcilable conflict with one another. The wonder, however, is, not that such blemishes should occur, but that there are not more of them.

The Digest—or Pandects (all-receiving), as it is also called from the multiplicity of its sources—was issued with authority of law, in December, 533. It is divided into fifty books, and each book is divided into a number of titles (*tituli*), each with its appropriate heading. Under these titles stand the extracts, each one preceded by the name of the author and of the treatise from which it was taken. The aggregate number of extracts is about 9,000. Many of them are very short, consisting of one or two lines, and, in some instances, containing only part of a sentence; while others would fill several octavo pages of average size. About a third of the collection is taken from one author, Ulpian, the most prolific of Roman law-writers, who was prefect of the praetorium, in the reign of Alexander Severus, and lost his life in an insurrection of the soldiers. Julius Paulus, a contemporary of Ulpian, stands next to him in the amount of material furnished to the collection: to Ulpian and Paulus, taken together, belongs

half the Digest. Next to these in the amount taken from his writings, but perhaps superior to all others in the intrinsic merit of his contributions, is Papinian, the faultless model of a Roman jurist, who was regarded by his contemporaries with a veneration which has been sustained by the judgment of succeeding ages. When the tyrant Caracalla murdered his brother Geta, he called upon Papinian to prepare an address to the Senate, in vindiction of the act, promising, if he would do so, to forgive him for the favor which he had shown to Geta while living. But the jurist refused to comply with the demand, saying that it was easier to commit an act of fratricide than to defend it; no doubt, foreseeing the fate which such an answer to such a prince could not fail to bring on the man who gave it.

But it would lead us too far to notice in detail the other writers whose works are represented in this great collection. It concerns us more to observe that, while the Digest or Pandects forms much the largest fraction of the Corpus Juris, its relative value and importance are far more than proportionate to its extent. The Digest is, in fact, the soul of the Corpus, which, without it, would seem almost a *cadaver*, the corpse or skeleton of itself. It is the characteristic element, which distinguishes this from other codes, ancient and modern, and gives it the undeniable superiority. In most codes we have, from beginning to end, only a dry,

categorical, imperative "thou shalt," "thou shalt not," "do this and live," "avoid that, abstain from that, or suffer the penalty." But in the Digest we have definitions, maxims, principles, applications, distinctions, illustrations—all in endless abundance and variety. It is as if one should make a compend of English law by selecting the most judicious and accurate statements from treatises like those of Blackstone and Kent, and the most pithy, pointed, luminous utterances from the decisions of judges like Mansfield, Scott, Marshall, and Story; and placing them together in an arrangement which, if not altogether scientific, should be, at least, practically convenient, natural, and easily comprehended. A digest constructed on this plan was in the highest degree fitted to be a teacher of law to after-times; for it shows the spirit of the law, the principles of equity on which it is founded, the reasonings and method by which it is built up as a rational, intelligible, orderly system. No other code has been so well adapted to stimulate, develop, and discipline the juristic sense; the great office which the Corpus Juris, operating mainly through this part of its contents, has discharged for mediæval and modern Europe.

We have seen that the other leading component of the Corpus Juris—the Codex Constitutionum—was prepared in the year 528 and the first part of 529. It was only natural that the time and labor bestowed on the preparation of the Digest should have brought to

light numerous incongruities and imperfections in the earlier work. In many points, the compilers had come to have a more distinct and a more advanced conception of the modifications which it was desirable to make in the older system. Hence, the Codex appeared, in the light of these altered views and this added experience, to be, as it were, already obsolete, not to be in harmony with the Digest, or worthy to have a place in the final and authoritative Corpus Juris. It was resolved to subject it to a thorough revision, or redaction. This task occupied another year; and in November, 534, the new Codex Constitutionum, the *Codex repetitae praelectionis*, was published, to take effect on the 29th of December, the former Codex being then repealed. It is in this latter form only that the Codex has come down to us. It is divided into twelve books, and these again into titles, with headings to indicate the subject of each one, under which the constitutions pertaining to that subject are arranged in chronological order, with a statement, for each, of the emperor by whom, and the year in which, it was issued. The arrangement of subjects, as might be expected, is in general the same with that of the Digest. An absolute agreement in this respect was not regarded as necessary, especially as the Codex embraced a number of topics which, by the nature of the case, could not appear in the Digest. The latter was of course silent on all matters and relations which had risen into being

or importance during the two or three centuries before Justinian, as all the writers represented in it were of older date than two, nearly all of older date than three centuries before. Thus, the church, the clergy, the monastic orders, and other matters pertaining to the Christian religion, so far as they could come within the cognizance of civil law, figure largely in the Codex, as they were among the most frequent subjects of legislation for Constantine and his successors. But the series of great law-writers had come to an end some time before Christianity ascended the imperial throne; the Digest, therefore, has nothing to say of its officers and institutions.

In general, it may be said that the Codex consists, to a much greater extent than the Digest, of *public* law, in all its departments; that is, the law which prescribes and regulates the organism of the state, with all state institutions, whether civil or ecclesiastical. Here belongs all that relates to forms of government, modes of administration, duties of public officers, and the like. Under public law is included also *criminal* law, the law of crime and punishment—a crime being a wrong action viewed as affecting the rights, not of individuals, but of society, as a violation of public peace and order, as an offence against the state. On the other hand, *private* law is occupied with the rights of individuals, with the modes by which individuals may acquire such rights, or transfer them to others, and the

ways in which individuals may obtain personal redress when these rights are impaired by fraud or violence. Now the fact which I wish to emphasize is this, that the Digest is composed of private law in a far larger proportion than the Codex. This is a fact which gives to the Digest something of the superior interest and importance which belong to it. It is mainly by reason of the private law which it embodies, that the Corpus Juris has exerted its immense influence on jurisprudence and justice in modern Europe. The public law of the Corpus Juris was something distinctively Roman, and even Byzantine, the last result of a peculiar political development, which has occurred but once in the history of the world, and can never be repeated. To modern states, founded on different principles from those of ancient Rome, and seeking widely different ends by means that differ not less widely, the public law of the flourishing or expiring empire could have only a very limited application. The private law of the Romans was, to a great extent, based on principles of natural equity and universal reason, which have not lost their force with the altered circumstances and advanced civilization of more recent times. Hence, it has been received as fundamental law by some of the most enlightened and civilized nations of modern Europe. But no modern state has received the public law of the Romans as the foundation of its own public law. All attempts to give it this position and character have

failed of success. Thus, when the great German princes of the Hohenstaufen dynasty, as Frederick Barbarossa and Frederick II., were endeavoring to build up a new Roman Empire, a Holy Roman Empire, in Germany and Italy, the Italian jurists of the famous school of Bologna supported the imperial pretensions with texts and rules drawn from the storehouse of the Corpus Juris. They regarded, practically at least, its public and private law as parts of the same system, and therefore equally authoritative. But the feudal lords of Germany and the free cities of Italy insisted on making a distinction between the two, and denying to the one an authority which they accorded to the other.

But we have not yet considered all the component parts of the Corpus Juris. It was thought desirable that an introduction to the study of the law, an elementary text-book for instruction, should be included in the plan. The work prepared for this purpose was a brief treatise, in extent but little more than a twentieth of the Digest, to which it stands in the place of an introduction. It bears the name of "Institutiones," i.e., instructions, viz., for the beginner; a name significant of the purpose which it was designed to serve. It was founded on a work of the same name ("Institutiones"), composed by Gaius, in the time of the Antonines, about four centuries before the reign of Justinian. Gaius is very often cited in the Digest; only Ulpian, Paulus, Papinian, with a fourth writer named Pomponius,

stand before him in this respect. Yet, strangely enough, nothing whatever is known as to his personal history; his very name is irrecoverably lost, for Gaius is only a prænomen; it is as though Milton were only known as John, or Shakespeare as William. Perhaps nothing more was known of him in the days of Justinian. It would seem, however, that his Institutiones had been, from the time of its appearance, a popular book for law-students at the outset of their course, and this popularity may have served to buoy up the other compositions of its author. Of these other compositions, one—named "Res Quotidianae" (daily cases)—was used in connection with the "Institutiones," in preparing the Institutiones of Justinian. The task of preparation was executed by Tribonian, with the assistance of the law-professors Theophilus and Dorotheus. The processes of omission, insertion, modification, were, of course, adopted here, as in other parts of the Corpus Juris, to bring about a conformity with the altered system of the law. The little treatise was finished and published at the same time with the Digest, in November, 533. It consists of definitions and elementary statements, and is divided into four books. The first book treats of family relations, as the relation of master and slave, father and child, guardian and ward. The second treats of property and the modes of acquiring it, ending with the subject of inheritance. The third treats of obligations, i. e., relations in which one

man is bound to give something to, or do something for, another man; relations which usually arise from an express or implied contract between the two men, but sometimes from violations by the one of rights pertaining to the other. The fourth treats of actions, i. e., suits at law, the legal remedies by which a man whose rights have been violated may seek redress for the wrong.

Thus, at the close of the year 534, Justinian had accomplished the work of reorganization or reconstruction of the law, on which he had entered seven years before, at his accession to the throne. The Institutiones, the Digest or Pandects, and the Codex Constitutionum, formed together a complete system of law and jurisprudence, which was assumed to be sufficient for all practical ends in the administration of justice. As such it was given to the law-schools as the exclusive subject of professional study. The principal law-schools of the empire were those of Constantinople, Rome, and Berytus, while institutions of inferior note were found in Alexandria, Cæsarea, and other places. The course of study, as prescribed by Justinian, in an ordinance of December, 533, consisted of five years. The students of the first year had hitherto been called by the nickname of *dupondii* (two-penny men); they were now to be designated as *novi Justinianei* (Justinian's freshmen); they were to read the Institutions, and to make a beginning with the Digest. The second, third, and fourth years were also given to the

Digest, but without proceeding further than through thirty-six out of the fifty books. The instruction of these four years was carried on by lectures and recitations. In the fifth and last year, the students were left to themselves, and read (or were supposed to read) the remainder of the Digest, and the Codex Constitutionum. To the courts of justice the new Corpus was given, as superseding all former authorities. No ancient jurist must be cited, no earlier constitution appealed to, except in the words of the Corpus Juris. The exact preservation and transmission of its text was an object which excited the special solicitude of the emperor. The abbreviations, which were used by ancient scribes much more than by modern, and were especially common for technical phrases and formulas of frequent recurrence, often led to confusion and mistake. The copyist was expressly prohibited from using them in the transcription of this venerable work. But commentators were more dreaded than copyists. Justinian rigorously forbade the writing of any commentary on the books of the Corpus Juris. He conceded the privilege of making Greek translations, which, indeed, were almost indispensable in an empire composed in great part of Greek-speaking populations; but they must be close and literal versions, following the original faithfully from step to step (i. e., from sentence to sentence). He allowed also the formation of brief summaries, presenting the contents of a book or title

in a compendious shape, a syllabus or synopsis, with references to other parts of the work, and citation or collation of parallel passages. The reason for prohibiting commentaries was the apprehension that they would suggest new controversies or revive old ones, and thus bring the law again into that unsettled, uncertain condition from which so much pains had been taken to raise it. Perhaps, also, he may have feared that some commentary might arise which would eclipse the original; as, in the literature of English law, Coke upon Littleton is much more famous than Littleton himself. In any case, the object which he aimed to accomplish was neither attainable nor desirable. To enforce any system of law, it is necessary to find out what the system is, to ascertain its meaning, to interpret and expound it. Ambiguities of language are unavoidable, even in the most carefully constructed documents. Even if the language is unambiguous in itself, its application to new circumstances and conditions will involve uncertainties and queries. To resolve these doubts and difficulties, there must be a constant process of commentation, oral if not written. And if the process must go on, if commentation is unavoidable, it is well that it should be written; for in this form it will generally be more cautious and exact; and the best results, when they are arrived at, will not be lost in air, but will be recorded and permanent, to the great advantage of succeeding inquirers. Contro-

versies on points of legal doctrine are, indeed, the inevitable result of mental activity applied without restraint to legal questions and relations. To stifle thought and to suppress freedom are the only effectual means of avoiding such controversies. But, in a community where freedom is suppressed and thought is stifled, what rights can be secure? What is the worth of law without either intelligence or liberty?

It was no easy matter for a prince who had legislated so long and so much, to stay his hand and rest content with the work already accomplished. The appetite for legislation, like other appetites, is apt to grow with what it feeds on. The compilers of the Corpus Juris must have felt that in the new law-system, however much improved, there were still incongruities and inequalities which called for further improvement; that there were necessities, either not provided for at all, or not in the best manner, by any rules contained in it. From many sources must have come a real or apparent demand for further law-making. Thus we find that Justinian, after the completion of his great legislative work, issued a large number of new constitutions, especially in the years from 535 to 545, in the last of which he lost his able and active minister Tribonian. Many of these constitutions made little alteration in the existing law; but there were some which introduced extensive and important changes. Justinian did not think it necessary to work over the

whole Corpus Juris so as to bring it into harmony with the rules and doctrines thus established. He may have dreaded the expenditure of time and toil necessary for the recasting of a law-book so voluminous: he may have shrunk from calling on his subjects to throw away the heavy and costly tomes which he had compelled them to procure in order to replace them by others equally heavy and costly: he may have felt that the revocation of a law-system so laboriously constructed and so solemnly promulgated only a few years before, would lead people to regard the entire law as something uncertain, fluctuating, and transient. At all events, he contented himself with bringing these later ordinances, as fast as they were issued, into a separate collection, where they stood in chronological order, without any attempt to give them a logical arrangement. This collection bore the name *novellae constitutiones* (recent enactments): in all editions of the Corpus Juris, it stands as the concluding part, and by English writers is generally called the Novels, a name identical in spelling, though any thing but identical in what it designates, with that which we use for the compositions of Bulwer, Dickens, or Trollope. In these Novels, the language generally used was the Greek; some, however, were issued in Latin, and not a few in Greek and Latin at the same time. In the last case, it is curious to note that Justinian himself declares that the Latin form must be taken as the au-

thentic and authoritative original, and the Greek as only its translation; the Latin was still regarded, by the force of old tradition, as the proper official language of the empire. The actual use of Greek as the prevailing language of the Novels distinguishes this from the preceding portions of the Corpus Juris. In the Codex the large majority of the constitutions are in Latin, and Latin is the language of thirty-eight out of the thirty-nine writers embraced in the Digest.

In regard to this whole body of law, the construction and outward appearance of which have thus been described—and especially in regard to the Digest, its largest and most characteristic part—one may say, in general, that it was too good for the age in which it appeared. It was produced in a period of great and progressive decline, by men whom a study of older and better models had raised above the general level of their time. Apparently they hoped that, by bringing these same models into a form and position in which they could be generally known and studied, it would be possible to arrest the downward tendencies in the profession and practice of the law. In the reign of Justinian, at least in its earlier part, men were hoping for a good time coming. It seemed as if the clouds which had settled down on the Roman world were beginning to break away; as if the storm of barbarian invasion and conquest had spent its force, and the empire of the Cæsars was to recover its ancient power

and glory. The legislation of Justinian shows the influence of such anticipations. The old law, freed from the obsolete elements which encumbered and concealed it, was to have the ascendency which it exercised in the prosperous times of the earlier empire. These hopes, we know, were doomed to disappointment. The anticipated good time of restoration and revival never came. The downward tendencies of society were too strong to be arrested. The great law-book of Justinian seems to have gained no very wide currency among those for whom it was intended. It was, to a great extent, superseded in practice by paraphrases and abridgments, of the whole or of particular parts. An inquirer two or three centuries later, looking at the fate of this Justinian legislation, might have said that it was a splendid and elaborate failure. In the reign of Leo the Isaurian (717–741), the books of the Corpus Juris were hardly used at all in their original form; and even the paraphrases and abridgments founded on it were so ill adapted to the existing state of the law, that this emperor thought it necessary to issue a compendious code of his own. This was the state of things in the Eastern Empire. In Western Europe the Corpus Juris had never found currency, except in Italy; and here, in some parts and cities of the peninsula, it still enjoyed an obscure and precarious influence. How it emerged from this condition to one of world-wide note and commanding authority, will appear in the next lecture.

LECTURE II.

THE ROMAN LAW SINCE JUSTINIAN.

The Germanic tribes which became masters of Gaul, Spain, and Italy, in the fifth century, kept their Germanic law-customs for themselves, but suffered the conquered populations to remain under the old Roman law. Hence a system of *personal*, rather than territorial law. Persons were sometimes allowed to choose their own law by a *professio*. The multiplicity of systems was increased by the growth of an *ecclesiastical* law, founded on the Roman, but with features peculiar to itself, for ecclesiastical persons and relations.

In Britain, on the contrary, the Saxons and Angles, driving out the native inhabitants, became sole occupants of the conquered districts, and thus had no Roman law existing with and acting upon their own.

Some of the Germanic chiefs (Alaric the Visigoth, Theodoric the Ostrogoth, Sigismund the Burgundian) issued, for the use of their native subjects, summaries of the Roman law, drawn from the Theodosian code and other earlier sources. These appeared shortly before the Corpus Juris of Justinian, and were vastly inferior to it in extent and value.

It was formerly believed that the knowledge of the Corpus Juris in Western Europe began with the discovery of a copy (the Florentine MS. of the Digest, said to have been found by the Emperor Lothar II. at the taking of Amalfi in 1136. But Savigny has shown that the Corpus Juris, introduced into Italy during the reign of Justinian, never ceased to be known and used in parts of that country. But about 1100 (opening era of the Crusades) we find a greatly revived and extended study of the Roman law, carried on especially at Bologna, by a series of acute and profound law-teachers, called *glossators*, from the marginal *glosses* or comments which they wrote on their copies of the Corpus Juris. A voluminous collection of these glosses, made by Accursius, one of the last glossators (died 1260), is printed in old editions of the Corpus Juris.

As the effect of these studies, the Corpus Juris came to be received as law, as the main (though not exclusive) source of private law, first in

Italy, then in Southern France (*pays de droit écrit*), and at length (from the close of the thirteenth century) in Germany. In the last, it was favored by sovereigns who claimed to be chiefs of a Roman Empire, successors of Augustus, Constantine, and Justinian.

In Northern France (*pays de coutume*), the old customary law of the provinces—an unwritten body of Germanic usages, mixed with Roman elements and many things of later origin—maintained its leading position; but with this, to supply its deficiencies, the Corpus Juris was received as auxiliary law. In Spain, too, it was received in much the same way.

In England, the Roman law has never been received, even as auxiliary law. The common law (mainly an unwritten customary system, founded ultimately on Germanic usages) claims to supply its own needs by the extension of its own principles and analogies. Some of its expositors, as Blackstone, have shown an unreasonable jealousy of the Roman law. Yet the common law has been largely influenced by the Roman, in various ways: 1. Through the ecclesiastical courts, their canon law being founded on the Roman. 2. Through the court of chancery, all the early chancellors being ecclesiastics, and therefore familiar with the canon law, if not with the Roman system. 3. Through the development of commercial law in its various departments. The old common law was mainly a (feudal) law of real estate. When personal property rose into greater importance, and complex relations of business and trade had to be provided for, it was natural to adopt principles from the civil law as developed and applied on the continent of Europe.—(Early borrowing from Roman law sources seen in Bracton.)

The position of the Roman law in some countries has been lowered in appearance by the formation of new codes. A general code for the states of Prussia, projected by Frederick the Great in 1746, was prepared many years later, 1784–'88, and went into effect in 1794. In France, the changes caused by the Revolution seemed to call for a new code, but not much was done toward it until Napoleon became head of the state. The Code Napoleon, prepared in little more than two years, was proclaimed in 1804. It was followed in 1811 by a code for the German hereditary states of the Austrian monarchy. Yet, in all these countries, a knowledge of the Roman law is still regarded as essential to a proper understanding of their legal systems, and therefore as the necessary basis of a legal education.

THERE is a wide difference in the effects of a conquest, according as the conquerors are superior in civ-

ilization to the conquered, or inferior. When the Romans, under the lead of Cæsar, had become masters of Gaul, the old Celtic language of the country soon disappeared, and with it the old customs, laws, and institutions of the people. The language, laws, and institutions of the Romans took their place. In the course of a few generations, Gaul was thoroughly Romanized. Against a superior civilization armed with the force of political and military ascendency, the inferior had no chance of maintaining itself. But when the political and military ascendency is on one side, and the superior civilization on the other, the contest is more evenly balanced. When Romanized Gaul was overrun and subjugated by Germanic tribes in the fifth century, the conquerors did not impose either their language or their laws on the conquered people. In communicating with one another they continued for a considerable length of time to use their German mother-tongue: even Charlemagne, three centuries after Clovis, habitually spoke German. But in time they gave up their old language, and adopted the corrupt Roman of the country. Their laws they retained for their own use, as might have been expected, with much greater tenacity; but even these they did not attempt to impose upon the native population. Though naturally attached to their own long-established usages, and unwilling to abandon them, they seem to have felt that these usages were suited only to themselves; that the

requirements of civilized society, of settled and peaceful life, were better fulfilled by the highly-developed, complex jurisprudence of the Romans. Hence arose a very curious state of things, a system of personal, rather than territorial, law: the law to which a man was subject depended not so much on the place where he lived, as the race to which he belonged. The principle was, "German law for the Germans (i. e., the Franks, Burgundians, etc.), and Roman law for the Romans (i. e., the descendants of Romanized Gauls)." Thus two neighbors living side by side would be subject to wholly different systems, because one was of Gallic origin and the other of Germanic. Indeed, the principle was carried even further. The Franks were divided into two great sections, each of which had its own system of legal rules and customs, the Salian, or Western, and the Ripuarian, or Eastern, Franks. Now a Salian, wherever he might be, in whatever part of France, was judged by the Salic law; and in like manner a Ripuarian by the Ripuaric. In the case of a married woman, however, the law was determined, not by *her* nationality, but by her husband's, her legal existence and personality being regarded as merged in his. Where the parties to a lawsuit were of different nationalities, the law to be applied by the court was determined, sometimes by the person of the plaintiff who could claim that rights given him by *his* law had not been respected by the other party, and sometimes by the

person of the defendant who could maintain that in all his dealings with the other party he had only exercised rights conferred upon him by *his* law. In some cases a person had the privilege of making a *professio*, as it was called, i. e., of declaring publicly by what law he would live and be judged. Of the confused and motley character of such a system (if the word *system* thus applied is not a misnomer) it is difficult to form an adequate conception. The complication was further increased by the separate position of the clergy; all clerical persons, of whatever nationality, being subject to an ecclesiastical law, which, though in the main derived from the Roman, had many elements and features peculiar to itself.

The state of things here described, as subsisting in Gaul under the Franks, was not confined to that province. It prevailed with little difference in Spain under the Visigoths, and in Italy under the Lombards. The condition of Britain was essentially different. That remote dependency of the empire, among the last to be gained, among the first to be abandoned, had never been but very partially Romanized. And its conquest by the Germanic invaders, unlike that of the continental provinces, was a very slow and gradual one, proceeding from step to step for a hundred and fifty years. As one district after another became untenable, it was deserted by the old inhabitants, who by a journey of one or two days could escape from the detested

presence and power of the conquerors. Hence the Angles and Saxons became to a great extent sole tenants of the regions which they held in their possession. They were not settled—as were the contemporary Franks, Goths, and Lombards, and as the Normans of a later day in Britain—in the midst of a large native population, who by force of superior numbers, if not of superior civilization, must exert an immense influence on political and social relations. While in the continental provinces the dominant races gradually lost their old Germanic idioms, the Saxons and Angles in Britain preserved theirs with very little mixture either of Roman or of Celtic elements. While in the former the great body of the people had a law-system of their own, which could not fail in time greatly to affect and modify that of the conquerors, in Britain the old Germanic maxims and usages of law were exposed to no such modifying influence. I call particular attention to this peculiarity in the Anglo-Saxon conquest of Britain—the absence of any numerous conquered people, more or less imbued with Roman civilization, to react on the language and institutions of the conquerors—because it lies at the foundation of that wide difference which even now separates the common law of England and our own country from the other law-systems of Western Europe.

We have now to ask what was the Roman law which remained as a rule of action for the great mass

of people in Gaul, Spain, and Italy, after the barbarian conquests of the fifth century. It was the current Roman law of the time when those conquests were made, that is, of the century before Justinian and his great work of legislation. Its written sources were—1. The compositions of the ancient jurists, such as Ulpian, Paulus, Papinian, Gaíus, etc., who have been mentioned already as having furnished the materials of Justinian's Digest; and—2. The constitutions of the emperors, especially as collected and abridged in the Theodosian and other earlier codes. For the convenience of their subjects, several of the barbarian princes issued summaries, breviaries, or brief expositions of this Roman law, drawn from the sources just described, and adapted to the altered practice of the time. That is to say, they attempted to do, on a very small scale and with very indifferent results, the work so comprehensively, and, on the whole, so successfully accomplished in the Corpus Juris. Thus Alaric, king of the Visigoths, who reigned from 484 to 507, set forth in 506 a collection which is sometimes called *Lex Romàna Visigothorum*, and sometimes, from the name of the king, *Breviarium Alaricianum*. Almost at the same time, the able and powerful Theodoric, king of the Ostrogoths in Italy, promulgated his so-called *Edictum Theoderici*, as an authoritative exposition of the Roman law. And a work of similar design appeared only a few years later, about 517, in the kingdom of the Bur-

gundians, under the authority of their ruler Sigismund. These books were compiled in an unintelligent and bungling manner, and it is well that we are not obliged to depend on them for a knowledge of the Roman law. What is important to understand and remember in connection with them is the fact that, in Gaul, Spain, and Italy, during the early centuries of the middle ages, the great body of the people were subject to the Roman law, and that the books in which they had it were a little prior in date of compilation, and immeasurably inferior in value, to the Corpus Juris.

But was the Corpus Juris during all this time unknown in Western Europe? This question used to be answered in the affirmative. It was supposed that the knowledge and study of the Justinian books among the Western nations had its beginning in the twelfth century, and was occasioned by a happy accident. The oft-repeated story was, that the German Emperor Lothaire II., in 1136, while carrying on a war in Southern Italy, having besieged and taken the old city of Amalfi, near Naples, discovered in the booty of the captured place an ancient manuscript of the Digest or Pandects—some accounts declared it to be the copy which Justinian himself had for his own private use—which manuscript the captor gave to the people of Pisa, his allies in the war, who treasured it with religious care, accounting it one of the chief glories of their city; and that the jurists of Italy were thus led to a

study of the Justinian system, which this manuscript brought to their knowledge. There is no doubt that a very ancient manuscript of the Digest, written probably in the century after Justinian, was for a long time preserved in Pisa, and, on the conquest of Pisa by Florence in 1406, was transferred to the latter city, where it remains to this day, and is known as the Florentine, the oldest and the most valuable manuscript of the Digest. This is true: but the story of its discovery, as just related, by the Emperor Lothaire in Amalfi, appears to be a myth, and was perhaps occasioned by the preëminence and uniqueness of the manuscript. At all events, it is certain that the Corpus Juris was not unknown in Italy during the five hundred years which separated the sixth from the twelfth century. Savigny, the great German jurist of the last generation, has investigated this subject in his masterly work, entitled "History of the Roman Law in the Middle Ages," and has proved, by incontestable evidence, that the books of the Corpus Juris, from the time of their promulgation, never ceased to be known and used in Italy. Justinian was still engaged in his work of law-reform when he began to assail the Ostrogothic power, an arduous undertaking, which required the efforts of many years, but, through the splendid military talents of Belisarius and Narses, was at length crowned with complete success. The success, however, though complete, was not lasting: three years

after the death of Justinian, the Lombards, the rudest and fiercest of the Germanic invaders, established themselves in Northern Italy, and gradually extended their dominion to the middle and southern parts of the peninsula. The Greek power in the North was soon confined to Ravenna, on the Adriatic, and the region just about it, and there it contrived to maintain itself, hanging on the verge of Italy, for some two hundred years. But, if the Greek ascendency was short-lived, it was fortunately long enough to introduce the Justinian law-books, and to give them such a hold on the courts and practitioners of law, that they were able to survive the power that introduced them. It is known that Justinian established in Rome a school of law, similar to those of Constantinople and Berytus. When Rome ceased to be subject to Byzantine rule, this law-school seems to have been transferred to Ravenna, where it continued to keep alive the knowledge of the Justinian system. That system continued to be known and used, from century to century, in a tradition never wholly interrupted, especially in the free cities of Northern Italy. It seems even to have penetrated beyond Italy into Southern France.

But it was destined to have, at the beginning of the twelfth century, a very extraordinary revival. This revival was part of a general movement of the European mind which makes its appearance at that epoch. The darkness which settled down on the

world, at the time of the barbarian invasions, had its midnight in the ninth and tenth centuries. In the eleventh, signs of progress and improvement begin to show themselves, becoming more distinct toward its close, when the period of the Crusades was opening upon Europe. Just at this time we find a famous school of law established in Bologna, and frequented by multitudes of pupils, not only from all parts of Italy, but from Germany, France, and other countries. The basis of all its instruction was the Corpus Juris Civilis. Its teachers, who constitute a series of distingushed jurists extending over a century and a half, devoted themselves to the work of expounding the text and elucidating the principles of the Corpus Juris, and especially the Digest. From the form in which they recorded and handed down the results of their studies, they have obtained the name of glossators. On their copies of the Corpus Juris they were accustomed to write glosses, i.e., brief marginal explanations and remarks. These glosses came at length to be an immense literature. One of the last glossators, Accursius by name, made a condensed selection from the whole mass of notes, those of his predecessors and his own; but this selection, which was several times printed in early editions of the Corpus Juris, is itself a voluminous work. It is acknowledged on all hands that the explication by the glossators of the Corpus Juris, and the system of law embodied in it, was, for

the time in which it appeared, a very remarkable production, an enduring monument of the industry and ingenuity of its authors. Their knowledge of collateral matters was, of course, very limited; their conceptions of the ancient world were, in many respects, crude, and almost childish; wherever historical or antiquarian learning was necessary, they were pretty sure to go astray. But, whatever could be accomplished by studying the Corpus Juris alone, and the comparison of its different parts with each other, of all that they left little for their successors to accomplish. Their complete mastery of the text, in all its extent and variety, and their ability to bring together, from every part of it, all that could throw light on any given point, have never been surpassed, and seldom equalled, by later interpreters.

Here, then, in this school of the glossators, at Bologna, in the twelfth and thirteenth centuries, the awakened mind of Europe was brought to recognize the value of the Corpus Juris, the almost inexhaustible treasure of juristic principles, precepts, conceptions, reasonings, stored up in it. We do not propose to trace the scientific study of the Roman law as carried forward by successive generations of zealous and able scholars from that time to the present. We will only attend to some statements designed to show the effects of this study on the systems of law and justice established and administered among the nations of modern Europe.

In Italy, the native seat of this study, the Corpus Juris soon came to be regarded, in all cities and regions of the peninsula, as having the character and authority of fundamental law. By this it is not meant that every thing contained in it was held to be binding, or was enforced as law, by the courts. On the contrary, many things were recognized as being wholly without legal force, because they were inconsistent either with legislative enactments or with customs so long established and so deeply rooted as to have the force of law. But, when we say that the Corpus Juris was regarded as fundamental law, the meaning is that its texts could be cited in the courts with the presumption that they were binding, so that any one who disputed their binding force would have to prove his negative. The burden of proof would rest upon the party who sought to invalidate them. He would have to establish the existence of some authoritative legislation, or some equally authoritative custom, which conflicted with them, and rendered them inoperative.

In Southern France, also, the Corpus Juris speedily acquired the same commanding position. This result was favored, not only by the proximity to Italy, but still more by the previous familiarity of the people with the Roman law, in a form differing indeed, as we have seen, from that of the Justinian books, yet closely akin to it. At the time of the barbarian conquest, the proportion of Germanic settlers in Southern France

was much smaller than in Northern; so that the Roman law, as that of the native Gallic population, had much fuller possession of the ground, much greater weight and influence, as against the Germanic law, in the South than in the North. It is not surprising, therefore, that, in Southern France, the prevailing Roman law should soon give place to the more developed and perfect system of the Corpus Juris, and that this should become at length the established law for all classes, without distinction of birth or race.

It is more remarkable that this revived Justinian law should find a similar reception in Germany. In the states of that country, the whole population was of Germanic origin, unmixed with Roman or Romanized elements. They had never been accustomed to see a Roman law administered in the midst of them, side by side with their own Germanic usages. We might have expected that the introduction of an alien system would have been offensive to national feeling, and would have encountered determined opposition. Such opposition we know was made even in Northern France, with a considerable degree of success; it was made with still greater success in England. Nor, indeed, was a like opposition wanting in Germany. The feudal nobility and gentry strove to maintain the old national law against the encroachments of the new system. They had sufficient strength to preserve intact those feudal principles relating chiefly to tenure

of land and inheritance, in which they were most deeply interested. But, on almost all other subjects of private law, the Corpus Juris came at length to be recognized as the great fountain of legal principles and rules. From about the close of the thirteenth century, it was received throughout Germany as authoritative law. The principal authors of this change were the educated lawyers. The men of thorough juristic training felt the vast superiority of the Corpus Juris as a source and teacher of jurisprudence over the rude, scanty, and conflicting law-systems of their Germanic fatherland. They were desirous to extend its application and influence as widely as they could. In such an extension they saw this great advantage, that the law would become in the main uniform and consistent through all districts and territories of their country, while the previously-existing systems were local and particular, varying endlessly from district to district and from city to city. If in our New-England States the systems of law were widely different from one another, there would obviously be a great convenience in the adoption of some one system which should be recognized in all as authoritative, especially if it was far more fully developed than those which it supplanted, and far more readily applicable to the shifting relations of society. The efforts of the German jurists to extend the authority of the Roman law were aided by the influence of the imperial government. It must be

remembered that the Kings of Germany were acting for a series of centuries under a strange but powerful illusion. They called themselves (Kaisers) Cæsars, successors of Julius, Augustus, Tiberius, and the rest. They styled themselves emperors—emperors, not of Germany (they were only Kings of Germany), but of the Holy Roman Empire, the empire of Trajan and the Antonines, of Constantine and Theodosius and Justinian. Their efforts to give reality to this illusion by an effective conquest of Italy, and the resistance to their projects offered by the free Italian cities and the Papal power, were for a long time the central movements of European history. How these efforts failed of success—how, like the dog in the fable, the German chiefs lost their real crown in trying to seize the shadowy one—how they squandered their resources in Germany to procure the means, always insufficient, for the subjugation of Italy, and thus in the end lost both Italy and Germany—this is not the place to relate. But it is easy to understand how princes who were accustomed to think of themselves as heads of a Roman Empire, as successors of Roman law-givers, would favor the establishment of a Roman law-system in all parts of their dominions. We find the two greatest of the German emperors, Frederick Barbarossa and Frederick II., in close relations with the famous civilians, the glossators of Bologna. Frederick Barbarossa, as was stated in the first lecture, sought and obtained

their aid in support of his pretensions as an Italian sovereign. He induced them to append some of his ordinances to their copies of the Corpus Juris, and to include them in their lectures and annotations. But the most effective service rendered by the imperial government toward the reception of the Roman law in Germany, was by ordaining that none but jurists, regularly trained and thoroughly accomplished, should preside in the higher courts of justice. Such judges had both the disposition and the ability to give effect to the principles of the Roman law in the tribunals over which they presided. The inferior courts could not easily hold out against the pressure brought to bear upon them from above. Thus through the whole system of courts, lower and higher, the Corpus Juris was recognized as the authoritative basis of private law.

In what has been already said of Southern France, it was implied that the state of things was different in the provinces of the North. It is true that here, too, the educated jurists made the same efforts to give currency and paramount force to the teachings of the Justinian books. But law-customs of Germanic origin were more deeply rooted here, and more tenacious of life, than in Southern France, and there was not the same disposition, as in Germany, among the political chiefs of the state, to favor the introduction of the new system. Hence it never gained the same commanding position as in the countries already mentioned. While

the southern part of France was wont to be spoken of as the country of the written law, i. e., of the Corpus Juris, the northern part was designated by a corresponding name as the country of the customary law. Its fundamental law, which varied in the different provinces (Normandy, Anjou, Touraine, etc.), consisted everywhere of the so-called customs of the provinces (customs of Normandy, customs of Anjou, etc.). By the name "customs" here is meant a body of traditional law, formed by a fusion of materials derived partly from the old Franks, partly from the conquered Gauls, with others of later origin, and handed down for a considerable time without being written out as a code, though usually collected sooner or later in a written system. From the formation of these customs it is apparent that there were Roman-law elements in them, mixed up with very much of a different character. Now, along with these customs which constituted the fundamental law of the province, the Corpus Juris had a recognized and authoritative but subordinate position as auxiliary law. Where the customary law had no rule applicable to the case in hand, such a rule might be cited from the Corpus Juris, and would then be binding on the court. The burden of proof here lay upon the party that invoked the Roman rule; he must show that the case was not provided for in the customary law, and that the way was thus open for an appeal to the Corpus Juris.

In Spain the Justinian books were received and treated in a manner substantially the same as in Northern France. At the basis lay a customary law, written or unwritten, which was of Spanish origin, but contained many Roman-law elements; while, along with this, the Corpus Juris was referred to in the courts, and respected by them as a body of auxiliary law, invested with binding authority so far as it supplied the deficiencies of the native system.

If now we quit the European main-land, and cross over to the island-realm of our own ancestors, we seem at first view to have parted company with the Roman law. The fundamental law of England is the so-called common law—common (that is) to all parts of the kingdom, in distinction from the local usages, which in former times were very numerous, usages peculiar to one or another district of the country. This common law is in the main an unwritten law; that is, the most of it never appeared in written, statutory form, as enactments of a legislative authority, a legislator, or a legislature. It is in the main a customary law, a body of traditional usages, some of them handed down from Anglo-Saxon times, some introduced by the Normans, but most of them evolved spontaneously, as it were, in the practice of the courts, without legislative interference or action. To the Justinian books it concedes no binding authority, even as auxiliary or supplementary law. It professes to supply its own

deficiencies by extending its own principles and analogies to new cases as they arise. Its courts never recognize the Roman law as having the force of law, except in those mixed cases which, from the foreign citizenship of a party or from some other cause, belong in part to an alien jurisdiction. It must be said even that, by many practitioners and professors of the common law, the civil law has been regarded with a feeling less favorable than mere indifference, with a tinge of jealousy or repugnance. Blackstone, the great expositor of the common law, seldom speaks of the civil law except in terms of disparagement. In general, he refers to it only to point out its inferiority to the common law; much like the Frenchman who avowed that he learned English in order to see how far inferior Shakespeare was to the great Corneille. He is fond of contrasting the free spirit of the common law with the despotic tendencies of the civil—a distinction unquestionably just as regards public law: that law, which defines the form and powers of the government, must of course be despotic if the government is a despotism, and liberal if the government is a commonwealth. But the public law of the Justinian books (including the criminal as well as the constitutional law) has never been adopted in the states of modern Europe. When the civil law is referred to as having a practical interest for modern times, it is a system of private law that we are to think of, and it

would be hard to prove that this is less liberal, less equitable, or more oppressive in the Corpus Juris, than in the common law of England. Blackstone repeatedly alludes to efforts made in the time of the early Norman kings to introduce the civil law into England, and represents them as made by popish ecclesiastics in the interest of the papacy. It is probably true that, among the English of those times, a knowledge of the civil law was pretty much confined to ecclesiastics: but, if they esteemed the finished results of a long-cultivated and highly-developed jurisprudence more than the native customs of a semi-civilized people, one can imagine other reasons than prejudice, bigotry, and self-interest, for the preference. But, though the efforts of these ecclesiastical civilians were unsuccessful, though they failed to secure for their favorite system any definite and recognized authority as law, fundamental or auxiliary, it would be a mistake to conclude that the civil law has been without influence on the theory and practice of law in England. On the contrary, its influence has been felt in many ways and to a very great extent.

Thus, in the first place, through the ecclesiastical courts. To these we have referred already. The Church at an early period claimed and secured the right of jurisdiction in cases where her own interests were involved, or those of her ministers. The ecclesiastical courts had cognizance of offences committed

against clergymen, and offences committed (or alleged to have been committed) by clergymen, and of all encroachments, real or supposed, on the property rights of the Church. But their jurisdiction took a wider range. On the ground that marriage was a sacrament, it was extended to matrimonial law, to cases of divorce, separation, alimony, and the like. From the connection of wills or testaments with death, the solemn transition to a spiritual world, it was extended to cases of testamentary law, to the proof and execution of wills, and even to the administration of properties whose owners died without will. To all these cases the ecclesiastical courts applied their own ecclesiastical or canon law; but this, as we have seen, was to a great extent founded on the civil law; so that through this avenue much of the procedure and principles of the civil law found admission into the English system.

So, again, through the court of chancery. All are aware that this court is distinguished as being (in name at least) a court of equity. Its powers for a long time past have been pretty definitely fixed, but in earlier times they were large and vague. One leading object of the court was to exercise an equitable jurisdiction, to afford relief in many cases where the operation of the strict rules and forms of law was oppressive and unjust. Now the court of chancery was not an ecclesiastical court; but its presiding officer, the king's chancellor (the keeper of the royal conscience), was

for a long time always an ecclesiastic. Hence it was only natural that the doctrines and methods of the civil law should find entrance largely into this branch of the English system.

Yet again, through the development of commercial law in its various departments. The early English law (the private-law part of it) was almost exclusively a law of real estate. It was a feudal law, and the whole feudal system rested on land. Tenures of land, the modes of creating or transferring them, the rights and duties connected with them, and the like—these are the great subjects of the early English law, while other species of property receive scarcely any attention. Hence, as personal property rose into greater relative importance, as trade became more developed, and business relations more complicated, cases were continually arising for which the English law had no rule or principle adapted to their nature. Doubtless, if there had been no other or better source to draw upon, the English judges could have made shift to enlarge the scope of old principles or to devise new ones, so as to meet the demands of each case as it arose. But in the civil law, they found ready to their hand a store of such principles, carefully worked out and copiously illustrated; these principles, too, being recognized and acted on by the nations with which England was most closely connected in commercial intercourse. It is not surprising that the English judges should

have adopted them in their decisions, and so incorporated them into the English law. They have not always, perhaps not usually, taken them directly from the Corpus Juris; but from the writings of foreign civilians, especially the French, and the judgments of foreign tribunals. It is acknowledged, however, that for her commercial and maritime law, England is largely indebted to the civil law, as set forth in its ancient standards or by its modern expositors. Even in its own proper domain of real estate, property in land and buildings, the common law is not without obligation to the civil. The earliest writers on the English law—Glanville in the twelfth century, Bracton, and the unknown author of a work called "Fleta," in the thirteenth—show many traces of the knowledge and influence of the civil law. This is especially conspicuous in Bracton, the most important of the three, of whose work nearly a third part consists of quotations (unacknowledged quotations) from the Corpus Juris and from commentators on it.

I have thus endeavored to give you some definite conceptions of the influence exerted by the Roman law, embodied in the Corpus Juris, on the law and jurisprudence of the leading nations of modern Europe. It ought, however, to be added that in some of these countries the position of the Justinian books has been altered, at least in appearance, by the codes adopted in them within the last three-quarters of a

century. A general code for all the states of Prussia was designed by Frederick the Great as early as 1746, but the work remained for many years unexecuted. After the death of Frederick it was taken up again; the preparation occupied four years, from 1784 to 1788, but it was not until 1794 that the new code went into effect. It was soon followed by the more celebrated Code Napoléon in France. The sweeping changes brought about by the Revolution, the destruction of the old feudal order and the old ecclesiastical system, the equalization of civil rights for all classes of the people, naturally suggested, and indeed seemed to require, a remodelling of the law. Owing, however, to the agitations of the revolutionary period, the first attempts at such a work had little result. But when Napoleon, after giving a settled order to the state, turned his energetic will to this undertaking, its progress was rapid. The new Code Civil, prepared in little more than two years, was proclaimed in 1804, and soon received the name of Code Napoléon. The emperor always regarded it as the chief glory of his reign; he said, "I shall go down to posterity with the code in my hand." It was partly, no doubt, the influence of the French Code that induced the preparation of a similar work for the German hereditary states of the Austrian monarchy. The Austrian Code was promulgated in 1811. Thus in three great countries, Prussia, France, Austria, new codes have come in to

take the place before held by the Corpus Juris. But it does not follow that the Corpus Juris has lost its influence in these countries. It may have disappeared in name, but it survives in reality. The new systems in the main embody, with more or less change of form, the law before recognized and applied in the same countries. The elements of Roman law before received, in France, Austria, and Prussia, have passed into these codes. Indeed, it is impossible to understand them thoroughly or to interpret them properly without a knowledge of the Roman law. To know what their makers had in mind and sought to express, to determine the real meaning of their utterances, it is often necessary to consider the principles and conceptions which their training in the Roman law had planted in their minds. Hence a study of the Roman law is considered no less necessary now than it was a century ago for the thoroughly accomplished French or German jurist. This study forms a leading part in the course of law instruction as now pursued in the universities of those countries.

The subject of the next lecture will be the history of the Roman law prior to the time of Justinian.

LECTURE III.

THE ROMAN LAW BEFORE JUSTINIAN.

No law-system can be understood thoroughly without some knowledge of its history and development.

The history of the Roman law from the Twelve Tables to Justinian falls naturally into three almost equal periods, coinciding nearly with the times of the republic, the heathen emperors, and the Christian emperors. 1. From 450 to 100 B. C., marked by a progressive liberalization of the law. 2. From 100 B. C. to 250 A. D., marked by the creation of a scientific law-literature. 3. From 250 to 550 A. D. (toward the close of Justinian's reign), marked by the codification of the law.

Third Period.—Its codes were the Gregorian and Hermogenian in the fourth century, the Theodosian in the fifth, and the Justinian in the sixth. Its character as a time of decline, without originality or independence, is shown in a law of the fifth century, which, after designating certain earlier law-writers as authoritative, directed the judge, when these differed, to follow the majority, only exercising his own judgment when the numbers were equal, and not always then.

Second Period.—Its scientific law-literature was produced by a class of men called *jurisconsulti* (*jurisprudentes*, *jurisperiti*), distinct from pleaders (*oratores*), judges (*judices*), and magistrates (chiefly *praetores*). The *orator* had to maintain his client's cause before the *judex*; the *judex* (very different from our judges) had to investigate and decide an issue presented to him in a *formula* from the prætor; the *prætor* (who held the middle step in a course of political honors) had to construct from allegations of the parties such a *formula*, or precise statement of the issue. All these depended on the jurisconsults for legal knowledge and counsel. The first jurisconsults were in general elderly men (as Cato the Censor, in his old age), whose lives had been passed in political and

military service; but afterward they were men who (like Cato's son) devoted their whole lives to this profession.

The law-writings of the Catos, and all others before 100 B. C., were of a merely technical character. The first scientific law-writers were Q. Mucius Scaevola and his scholar Servius Sulpicius Rufus. For about two hundred years, from Augustus to the Antonines, the jurists were divided into two schools, founded by Ateius Capito and Antistius Labeo, but named from later chiefs Sabinians and Proculians. Yet their numerous differences of opinion seem not to have depended on any general principles or tendencies.

The authority of the jurisconsults was for a long time only moral. But by an arrangement commencing under Augustus, certain of the number received a *jus respondendi*, by which the response of such a jurist on any law-question, when properly brought before a *judex*, had the full force of law; though if opposite opinions were brought from jurists thus privileged, the *judex* could decide for himself. These *responsa prudentium* contributed much to develop the Roman law-system. The same force of law belonged also to the treatises composed by these jurists, except in cases where they were found to conflict with one another. Opposite tendency in English law to undervalue the works of systematic writers.

This juristic literature is known to us chiefly by the extracts in Justinian's Digest, which appears to be in extent about a twentieth part of the works used in compiling it. But many law-books were not so used; many, perhaps, had perished before the time of Justinian. And the extracts taken for the Digest were all subjected to a process of revision and alteration. Outside of the Corpus Juris, we have a number of fragments, but only two works of much extent, viz.: 1. The *Sententiae Receptae* of Julius Paulus, abridged but not otherwise altered, which has come down in the *Lex Romana Visigothorum;* and 2. The *Institutiones* of Gaius, discovered in 1816 by Niebuhr in a palimpsest MS. of St. Jerome at Verona: some leaves were wanting, some undecipherable, but about nine-tenths of this most important work have been recovered.

First Period.—This begins (450 B. C.) with the code of the Twelve Tables. The plebeians had complained that the laws, being unwritten, were administered by the patricians in the interest of their own order; and gained the appointment of a commission of ten (*decemviri*) to draw up a written code. This was in most respects a statement of the law already existing: the changes seem to have related chiefly to public law. That the laws of Athens and Sparta had much influence on this code is

not probable. In the times of Cicero and Gaius, the actual law had become widely different from that of the Twelve Tables; yet this code remained the formal basis of Roman law, until superseded by Justinian's legislation.

It has been observed already that the Roman law is not to be thought of as having had through the history of the republic and the empire the same form, or even a form nearly the same, as that which we find in the books of Justinian. On the contrary, the Justinian books only represent one stage—the last attained in ancient times—of a long process of change and development. This previous history of the Roman law now demands our attention. No system of law can be thoroughly understood without some knowledge of its earlier forms and states. To comprehend clearly what it is, you must see how it came to be so. The principle applies not less to English law than to Roman. An able English writer declares that "even now a common purchase-deed of a piece of freehold land cannot be explained without going back to the reign of Henry VIII., or an ordinary settlement of land without recourse to the law of Edward I." There are many who regard this state of things as not only undesirable but unnecessary. They would break loose from the past, expunge all archaic ideas and elements from the law, and construct it anew with exclusive reference to the actual conditions of the present time. But to do this completely is a simple impossibility. The new

code for which such persons are sighing—the code which shall deal with present things as if there were no past, or as if the past had always been just like the present—if constructed at all, must be constructed by *jurists*, by men educated in the law; for only such men have the technical knowledge and the experience which such a task requires. But every educated lawyer is trained in a system which has come down from earlier ages, and bears the impress of the ages from which it has come. His mind is filled with precedents, models, conceptions, forms of thought and action, which had their origin in other times, and are not wholly adjusted to our own. His work must show the influence of these forces existing in his mind. He may strive against it as much as he pleases; he may cut and change to the utmost of his power; he cannot escape from himself, from the ideas and methods which education has made part of his mental nature. He cannot produce a work which is not shaped and determined in its essential features by his own previous training. But I need not argue further to show that such a law-system, independent of the past, so as to be explainable in all its elements and features without recurring to the past, is something not to be attained. Though longed for and looked for by many people, it is a mere chimera. The Romans certainly never aimed at constructing such a system. They never thought of discarding the body of law received

from their fathers, and framing another with new materials and new foundations. Both in the code of the Twelve Tables, and in the Corpus Juris Civilis, the leading object was to represent and perpetuate the preëxisting law. It is true that the systems set forth in these two collections differ very widely from each other. But the changes which made them differ were slow and gradual, the product of slowly changing circumstances: in general, they went no further than to meet some particular want of which men had become sensible; in no one age did they bear more than a very small ratio to the whole law-system.

The history of the ancient Roman law has its alpha and omega in the code of the Twelve Tables and of the Corpus Juris Civilis. It must end with the latter, because all further progress lies in the domain of mediæval or modern history. It must begin with the former, because for earlier times there are no sufficient materials for its construction. Of the Twelve Tables themselves we have only fragments. The previous forms and changes of the law are matters for conjecture rather than history. The historical interval of almost ten centuries which separates the Twelve Tables from the Corpus Juris divides itself naturally into three periods of nearly equal extent. They correspond in general to the three periods most prominent in the political history of Rome—the period of the republic, that of the heathen emperors, and that of

the Christian emperors. The first period for the history of the law begins with the decemviral legislation (of the Twelve Tables) in 450 B. C., a half-century after the expulsion of the kings, and comes down to 100 B. C., a half-century before the dictatorship of Cæsar and overthrow of the republic (i. e., it begins about half a century later, and ends about as much earlier, than the republic—from 450 to 100, a period of 350 years). Its distinguishing feature is the liberalization of the law, its transformation from a system of arbitrary rules and forms to a system of reason and equity. The second period, beginning at 100 B. C., comes down to 250 A. D., a half-century before the accession of Constantine, the first Christian emperor (from 100 B. C., to 250 A. D., another period of 350 years). Its distinguishing feature is the development of a scientific law-literature. The third period, beginning at 250 A. D. may be made to close at 550 A. D., in the latter part of Justinian's reign, after all but a few of his novels had been promulgated (a period of 300 years, from 250 to 550). Its distinguishing feature is the formation of great law-codes, the codification of the law. Of this last period nearly enough has been said already. We have alluded to the Gregorian and Hermogenian codes compiled in the fourth century; we have spoken of the Theodosian code compiled in the fifth, and, above all, of the Justinian code in the sixth century. It was a period of general and

great decline. Original genius is no longer to be found among those devoted to the law. The power of striking out new paths of investigation, of bringing forward novel and profound views of legal truth, has taken its place among the lost arts. It is now the highest attainment of the legal mind to comprehend the things written by the great men of former times. No one thinks of making a new treatise on law, unless it be by excerpting or combining old ones. Compilation is the prevailing form of literary activity. The Corpus Juris, by far the highest product of this period, owes nearly all its value to material produced in the period preceding it. The unscientific spirit of the time, its incapacity for independent thought, are well illustrated by a statute issued in the Western Empire about a hundred years before the reign of Justinian. This statute begins by naming five of the older jurists —Papinian, Paulus, Gaius, Ulpian, and Modestinus— whose writings are to have the authority of law; it then gives the same authority to other older jurists whose writings are quoted as authoritative by any of those five. But there were many points on which the writers thus recognized differed more or less widely in their opinions—many points on which the parties to a suit might quote conflicting passages from this wide range of juristic literature. How should the judge proceed in such a case? Who should decide when doctors disagreed? The special object of the

statute was to meet and relieve this difficulty. It directed the judge in any case of this kind to count the jurists quoted on one side and those quoted on the other, and to be governed by the majority. He was not allowed to consider the reasons for the two opinions, to weigh them against each other, and to decide accordingly. It was a mere question of numbers. It might be that one writer had given a careful study to some point on which two others had expressed themselves with little reflection; it might be that one of the two merely copied from the other: the judge must close his mind to all such considerations, and go with the majority. It might, however, happen that the jurists quoted on one side and the other were equal in number. Even in this case the judge was not always left to his own discretion; if Papinian was among the writers quoted, his opinion must be preferred; so that Papinian weighed more than any one jurist, yet less than any two, while all the rest weighed just alike. Only where the numbers brought forward on both sides were the same, and Papinian was not among them, was the judge allowed to think for himself. A procedure so mechanical could not have been thought of in the better days of Roman jurisprudence.

Let us now go back to the second period—from 100 B. C. to 250 A. D.—marked by the development of a scientific law-literature. We have seen that nearly all the writers represented in Justinian's Digest—

thirty-nine in number—belonged to this period: other names of law-writers—some of them highly distinguished—have come down to us from this time. It is natural to ask, What was the general position and office of the men—called *juris consulti*, *juris prudentes*, *juris periti*—who produced this body of literature? They were not advocates; they did not appear in the tribunals to plead the causes of their clients. They were not judges, set to try causes, to hear the testimony offered by the parties, to listen to the speeches of the advocates, and to give their decision or verdict. In the forensic system of the Romans, as it was during this period, neither advocates nor judges had in general much knowledge of the law. Cicero, the most famous of advocates, repeatedly acknowledges his own want of legal learning, and intimates that a very moderate acquaintance with the law was sufficient for the purposes of his profession; if any thing more was needed, it could be obtained for each case as it arose, by applying to the jurisconsults. In regard to the judges, their character and functions were very different from those of our judges. The Roman judges were not, as with us, the presiding officers in the administration of law and justice. This was the position of the magistrate, the prætor. When a suit at law was commenced, the parties appeared before the prætor, who made a preliminary examination, not to ascertain the merits of the case, but to find the precise

points in controversy. He heard the statements of the plaintiff and the counter-statements of the defendant, and from the two he constructed a *formula* (as it was called), a brief technical expression of the disputed issues. He then appointed a *judex*—in cases of private law there was usually but one *judex*—to try the case; into whose hands he put the formula, instructing him to investigate the matter, and if he found the facts to be so and so, as recited in the formula, then to condemn the accused party, but, if he did not find them so, to acquit him. With this formula as his guide, the *judex* proceeded to his work, to receive the evidence of the witnesses, to hear the arguments of the advocates, and finally to return his verdict or decisive judgment to the prætor who had appointed him. It will be seen at once that the office and duty of such a *judex* were of a subordinate nature, much inferior to those exercised by our judges, and not requiring, as these do, a thorough knowledge of the law. Even the magistrate, the prætor himself, though he had more need of law-knowledge than the *judex*, was not ordinarily a jurist, a lawyer by profession and training. The prætorship was not a permanent office; the incumbent held it for a year, and then gave place to his elected successor. It was one stage in the *decursus honorum*, or course of political advancement; it was the middle step in the ladder, between the quæstorship and tribuneship below it, and the consulship

and censorship above it. Thus, in general, the prætor was not an elderly lawyer, but a middle-aged politician. In matters of delicacy or difficulty he was naturally dependent on the advice of the jurisconsults. They were the experts in law, respected and resorted to as such by all concerned in the administration of justice, by the prætor, the *judex*, the *orator* or advocate, as well as by private persons who wanted to know their legal rights or the means of asserting and securing them. Often, especially in earlier times, they were elderly men who, after passing through the whole series of political distinctions, found an agreeable occupation for their advanced years in giving to their fellow-citizens the benefit of their knowledge and experience. Cicero, in more than one passage, shows us attractive pictures of Roman statesmen passing a serene, useful, and honored old age in such employments. But as time went on, and the law became more extended and complex, the jurisconsults were usually men who devoted their lives to the study and exposition of the law; that is, they were professional lawyers and counsellors. An example of the former class is the elder Cato—Cato the Censor—who died at an advanced age in the year 149 B. C.; among his prodigious and multifarious activities, he is said to have composed, apparently in his later years, several books on law. His son of the same name, who died in middle life a few years before the father, would be an example of the latter class. He

gave his strength to the law, made it the main business of his life, and wrote books upon it more numerous than his father's.

We have placed the beginning of a scientific law-literature at about 100 B. C. There was an earlier law-literature, to which these books of the Catos belonged, and were by no means its first productions. We hear of a law-book written as early as 300 B. C. But for a long time these books of law had no claim to a scientific character. They were mere collections of forms and rules, without any attempt to trace the principles involved in them, or to arrange the materials according to a logical system. The first jurisconsult who applied a scientific method to the treatment of the law was Q. Mucius Scaevola, whose old age coincided with the early youth of Cicero. He was, as we have already seen, the earliest writer cited in the Digest; four passages from a book of definitions written by him are found in the collection. He was followed by a scholar of no less ability and fame, Servius Sulpicius Rufus, of about the same age with Cicero, who praises him in high terms as the greatest of all jurists. As an orator he was surpassed only by Cicero himself. And now the number of jurisconsults who wrote treatises on law, begins to be large. It would not be worth while to enumerate here even the more distinguished names in the series. It may be curious, however, to notice a division into opposing schools or sects which arose

among them and continued for nearly two centuries. This division commenced in the reign of Augustus, with two jurists of strongly-contrasted characters and tendencies, Ateius Capito, a warm supporter of the imperial despotism, and Antistius Labeo, a man of independent spirit and strong leanings toward the old republicanism. The schools, however, were named from later chiefs. The followers of Capito were usually called Sabinians, from his scholar Masurius Sabinus; those of Labeo were called Proculians, from Julius Proculus, a scholar, not of Labeo himself, but of his follower Nerva, grandfather of the Emperor Nerva. It is remarkable that for a series of generations, from the days of Augustus to those of the Antonines, every jurist enrolled himself under one flag or the other, and was known as a Sabinian or a Proculian. The student followed the juristic faith of the master under whom he studied; if the teacher was a Sabinian, all his pupils were Sabinians, and all their pupils likewise. There may have been cases of conversion from one denomination to the other, but we hear nothing of them. It does not appear that the controversies of the two schools were conducted with bitterness or exasperation; yet the party lines were drawn with much distinctness. The two schools differed on many single points of opinion and doctrine. It is remarkable, however, that these differences do not appear to depend on any general principle, or mode of thought, or method

of investigation, characteristic of either party. Repeated attempts have been made to trace some such general ground of separation. Thus the differences have been referred by some to the influence of the Stoic or the Epicurean philosophies; by others, to an historical or an unhistorical method in the interpretation of the old law; by others, to innovating or conservative tendencies; by others, to a recognition of reason or of authority as the supreme guide. But none of these solutions will explain more than a part of the facts. From what we know of the personal characters of Labeo and Capito, it is likely enough that the original differences may have been of the kind last mentioned—that Capito may have been more inclined to follow established rules without thinking or judging for himself; Labeo more disposed to break over established rules, in reliance on his own thinking and judgment. But, as the schools passed down from one generation to another, new questions and controversies were continually added to the old ones; and if the differences had at first a common character, such as the one just supposed, this soon ceased to be the case. In fact, it was this multiplication of unconnected controversies that led eventually to the dissolution of the schools. Men must arise sooner or later who would be unable to agree with either school on all the points of distinction, who would recognize the Sabinians as right on some, the Proculians on others, and on others,

perhaps, would be inclined to dissent from both, preferring some third view of their own. The jurist Gaius, in the time of the Antonines, often speaks of himself as a Sabinian; perhaps he was the last who gave himself that name. Certain it is that the later jurists included in the Digest—Papinian, Ulpian, Paulus, and others—do not refer themselves to either school, but hold themselves free to exercise an independent judgment on all points of legal controversy.

A few words now as to the authority attached to this juristic literature. We have seen that the jurisconsults were the great expositors and interpreters of the law, and that courts and magistrates, as well as private parties, relied on them for legal information and counsel. Yet for a long time—through the whole period of the republic—their influence was only moral. Their counsel was received because they were believed to be able, learned, and honest; but nobody was legally bound to receive it. The prætor and the judex might act upon their own opinions of the law against the concurrent judgment of the jurisconsults. No doubt they did so very rarely, if ever; but there was no law to prevent them from doing so. But under the imperial *régime* there was a change in this respect. Augustus gave to certain jurists a privilege called *jus respondendi:* they could not only give answers when consulted on points of law (that right they had always enjoyed), but their answers were now to have the force

of law. The opinion of a jurist thus distinguished, when placed in a properly-authenticated form before a judex conducting a trial, had all the obligation of a statute: if the judge disregarded it, he did so at his peril. The opinion, of course, had reference, not to the facts of the case—which the judge himself had to determine—but to some point of law submitted to the jurisconsult; and even on this his opinion might be neutralized by a conflicting one from another person invested with the same *jus respondendi.* Where opposite opinions from authorized jurisconsults were laid before the court—and we may presume that this would seldom fail to be done in cases where there was any real doubt—the judge was at liberty to make his choice between them. The cases submitted to these privileged jurists were not always those which had come up in actual experience. It appears that fictitious or imaginary cases were also presented for their judgment: under such and such a possible or conceivable combination of circumstances, what would the law require? A recent able lecturer on ancient law, Mr. Maine, finds in this fact an explanation of the more thorough scientific development which distinguishes the Roman law from the English. The English law is made up chiefly from the decisions of the judges, as given in the published reports. But the judge confines himself as closely as he can to the facts of the case before him. Statements as to what

the law would be, in other cases differing more or less from the one in hand, are looked upon with disfavor: *obiter dicta* they are called, extra-judicial statements, both of which terms carry with them a shade of censure. But the Roman jurisconsult was liable to be called upon for his opinion on cases differing in every imaginable way from those which had occurred in practice, and was thus led to take into account and make provision for a multitude of relations which the English judge would leave untouched because they do not happen to be involved in the cases actually presented for his consideration.

The authority thus conferred on certain jurists by the *jus respondendi* would naturally extend itself to the books of which they were authors. If their written opinions on particular points submitted to their judgment had the force of law, there could be no reason for giving less weight to their written opinions when embodied in systematic treatises. They were not likely to express themselves less carefully or distinctly in writing for public or permanent use than in writing for immediate and individual occasions. It is quite certain that a large part of this juristic literature—all that was produced after the time of Augustus by jurists invested with the *jus respondendi*—was recognized at once as having the authority of law. Here, also, if different writers equally authoritative were in conflict on any point, as we know them to have

been on very many points, the magistrate or judge was free to follow his own convictions. The fact that these books, or most of them, had the force of law from the time of their production, will serve to explain the procedure of Justinian, when he gave the largest and highest place in his system to a digest of their contents. In English law there has been a pretty decided tendency in the opposite direction, a tendency to undervalue the authority of systematic writers. Even such works as those of Blackstone, Chitty, Sugden, and others of like merit, are, it is said, seldom referred to in the English courts. The *dicta* of a third-rate judge are deemed worthy of more attention than the carefully-reasoned opinions of a learned and thoughtful writer. Even Judge Kent, in his "Commentaries," speaks of the precise and well-weighed language of the judges on the one hand, and the loose expressions of the systematic writers on the other, as if this was the usual and natural relation. I know it will be said that the decision of a judge is the law for his successor, and therefore demands attention beyond the measure of its intrinsic merit. But in strictness the decision of a judge is *not* law for succeeding cases: it is only evidence of the law. It is the testimony of a witness, who is presumed to be learned and capable, explaining what the law actually is on the point in question. It decides the particular case, but it does not of necessity decide the similar ones that follow it. The succeeding

judge *may* reject the testimony of his predecessor as erroneous: he may find that the law was not in fact what his predecessor declared it to be; he may therefore *overrule* (that is the technical word for it)—he may overrule the prior decision. That judges should hesitate to exercise this liberty of varying from a previous ruling is natural and proper: it tends to diminish those uncertainties of the law which are so loudly complained of. Still it may perhaps be doubted whether the feeling is not carried too far, so as to result sometimes in the establishment of inequitable and oppressive rules. The consequences, indeed, would be worse if there were not an escape in practice. Such an escape is given in the fact that no two cases are altogether alike, so that a judge, who does not wish to follow what he regards as an inequitable decision, is generally able to find some distinction which will serve as an excuse for doing so. Is it said that the Roman system, when it gave to the utterances of certain jurists the binding authority of law, subjected itself to a danger and difficulty equally serious? I do not deny it; but the Roman system provided a more direct and honest escape by allowing those who had the *jus respondendi* full liberty to express opposite opinions, the court being then free to choose the one that seemed most reasonable; while the uncertainty that might arise from this conflict of opinions could always be removed, if necessary, by legislative interposition.

Of the juristic literature which we have been considering only a small part has come down to us. It is represented mainly by the extracts in Justinian's Digest. But we know that many works, many authors even, are not represented in that collection. It is probable that many works, especially of the earlier jurists, had already disappeared, so that the compilers of the Digest could not have used them if they had so wished. Of the works which they used, it appears from their own statements that they took about a twentieth part; of course, a larger proportion from some and a smaller from others, but a twentieth of the entire mass. It must be remembered, however, that we do not have these extracts in their original form. They were subjected to a systematic process of alteration, retrenchment, interpolation, to bring them into harmony with the condition of the law as it had come to be in the time of Justinian, or as he chose to make it by his legislation. Outside of the Corpus Juris, we have, besides a number of fragments, two works of considerable extent, the *Sententiæ* (or *Sententiæ Receptæ*) of Julius Paulus, and the *Institutiones* of Gaius. The former has come down in the collection of Roman law which the Visigothic King Alaric caused to be made for the native inhabitants of his kingdom, the *Lex Romana Visigothorum*. It is evidently the epitome of a much larger work, but appears to have undergone little change beyond abridgment.

Much more important, however, is the other work, the *Institutiones* of Gaius. On this, as we have seen, was founded the Institutiones of Justinian, the little outline or elementary text-book of law prefixed to the Digest. The original work of Gaius was until recently supposed to have shared in the general wreck which has overtaken the body of literature to which it belonged. But about fifty years ago it was discovered under circumstances so remarkable as to deserve a somewhat particular statement. The manuscript which contains it is of the class called palimpsest or rescript—*palimpsest*, i. e., "rubbed again," "scraped again," so as to efface the text first written on them and make clear space (*carte blanche*) for a new text; or *rescript*, i. e., "written over again" with a new text after the first had been cancelled. The old world suffered sorely for want of something to write on, something abundant, easily procured, and inexpensive, such as the later world has learned to manufacture from its rags. If the ancients had possessed paper like ours, they would hardly have failed to invent printing, which, indeed, as it was, they narrowly missed doing. Parchment, the best material which they had, was never abundant, and of course always costly. Hence it was a very common practice, especially with the monkish scribes of the early middle ages, to write on parchment that had been written on before. If the owner cared little for the old text, or if he

had it in some other copy, he would wipe it out with a sponge, often scraping the surface to make the obliteration more complete, and would then write the new text in its place. Rescripts have been found in which parts of the Bible have thus been blotted out to make way for scholastic divinity or monkish legends. In many cases the old letters are still traceable under the new: in others they can be made traceable by applying a solution of nutgalls, or some other chemical reagent, to freshen up the ink with which they were written. By such processes a good deal that is valuable has been read out, since the beginning of this century, from palimpsest manuscripts, especially by Cardinal Mai, the late keeper of the Vatican Library. But the recovered Institutes of Gaius is perhaps worth all the rest put together. The discovery was made by the historian Niebuhr. In 1816 he was sent by the Prussian Government as minister to Rome, in order to pursue there the researches necessary for his Roman History. On the way he stopped at several cities to examine palimpsest manuscripts preserved in their libraries. Among the rest he looked into the Chapter library at Verona, spending parts of two days in the place; and there he discovered a palimpsest of considerable extent, which a hasty examination showed him to contain in its original text the work of some Roman jurist. Savigny, to whom he wrote an account of his discovery, recognized the work as being the lost

Institutes of Gaius. The Prussian Government being called upon for aid, sent immediately to Verona two men, one eminent as a jurist, the other distinguished for his knowledge of ancient manuscripts, who spent several months in deciphering the text, and made out nearly every thing which diligence and skill could accomplish. The task was difficult throughout and in some parts utterly desperate. About a quarter of the parchment had twice gone through the process of obliteration and rewriting, so that the clearly legible text was the third which had been written upon it. It should seem that some old monk, wishing to copy certain works of St. Jerome, cast his eyes upon this parchment of Gaius, and thought it well fitted for his purpose. A book of law, and especially obsolete law, would not be of much value in his eyes. Having erased the old text by rubbing and scraping, he began to copy his St. Jerome, but, for some reason unknown to us, gave up his work when he had used only a quarter of the writing-material thus obtained. The parchment must have fallen afterward into the hands of some other person, perhaps a brother of the same convent, who also wished to make a copy of St. Jerome, but was not satisfied with the beginnings of his predecessor. He therefore erased what the latter had written, and used the whole, or nearly the whole, parchment for his own manuscript. In these processes the leaves were arranged without reference to the original order, but

only three leaves were wholly lost. When these are added to the parts which, after all use of glasses, re-agents, and guessing, were found entirely undecipherable, it appears that about a tenth part of the original work is gone. The nine-tenths that remain have thrown great light on the condition of the Roman law in its best period, and have given a new impulse to the study of its history. It is a noticeable fact that the letters of the recovered text show by their forms that they must have been written before the time of Justinian. It may be doubted indeed whether the work was ever copied after Justinian's legislation had given it a new form, and made the old one obsolete and invalid.

Let us take up now, for the short remainder of the hour, the first period, which I have designated as that of the liberalization of the Roman law, extending from 450 to 100 B. C. There will be time to glance at the Code of the Twelve Tables, the product of the decemviral legislation, which marks the beginning of this period. It will be remembered that the Roman plebs, in their long struggle with the patricians for equality of rights, had for some time demanded that the laws of the state should be reduced to a written form. They complained, doubtless with good reason, that the laws, being unwritten, could be, and were habitually, so manipulated by the patricians, who had the administration in their hands, as to be grievously unjust and

oppressive to the plebeians. The patricians, after long opposition, were forced to yield to the demand. A commission of ten persons was appointed in 451 with full powers to draw up a written code. The next year this commission reported ten tables or chapters of laws, and added two more in the year following. The object proposed was not so much to prepare a new system, as to produce an open and exact statement of the one already existing. Changes were indeed called for by the plebeians, and some of them were introduced into the code; but these related chiefly to public law, to political rights and obligations. It is probable that in private law the Twelve Tables did little more than give expression to the unwritten usages and rules of the preceding times. The stories of persons sent to Athens and Sparta, to get the laws of Solon and Lycurgus for the use of the decemvirs, are hardly entitled to credit. There is no reason to suppose that foreign elements were admitted to any great extent into this body of law. The Twelve Tables continued to be recognized for many centuries as the fundamental law of the Romans; they did not formally lose this character until it was taken from them by the legislation of Justinian. The law had become indeed so different in the time of Cicero or of Gaius, that the decemvir Appius and his colleagues would hardly have recognized it as their own system; yet Gaius and Cicero regarded the Twelve Tables as the foundation

of their law. Among the works of Gaius quoted in the Digest is a Commentary in six books on the Code of the Twelve Tables. Cicero tells us that in his youth boys were accustomed to commit them to memory, but in his later years this practice had gone out of use. The copies of them must have been very abundant; it is much to be regretted that none has been preserved to modern times. The quotations from the Twelve Tables found in extant works of ancient authors are quite numerous: the collected fragments number more than a hundred. In general, they are very short. Some of them, especially those quoted by the grammarians, preserve the antique Latin forms of the early republic; but the most are modernized in language.

The general character of the law-system embodied in this code will be a subject of consideration in the next lecture.

LECTURE IV.

PROGRESS OF THE ROMAN LAW DURING THE REPUBLICAN PERIOD.

THE early Roman law of the Twelve Tables was simple, but highly formal, having many forms of speech and action which were rigorously insisted on. This formalism is illustrated—1. In prosecuting for a money debt, by *sacramentum* or judicial wager; dangers to the plaintiff from overstating or misstating his claim. 2. In bringing an action to recover a piece of land, where, over a representative clod, the parties asserted their claims of right (*vindicatio*), and challenged each other in a *sacramentum*. 3. In buying and selling *res mancipi* (lands, buildings, slaves, horses, cattle), where a process called *mancipatio* or *mancipium* must take place, with five Roman citizens of full age as witnesses, and a sixth as *libripens* (balance-holder). 4. In making a valid testament, where the testator had to make a formal sale of his estate, with all the ceremonies of mancipation, to a so-called *familiae emptor* (purchaser of the estate). Value of such forms in authenticating legal transactions, and in making the parties sensible of the gravity and the binding force of their own acts.

The Romans from an early period were led to recognize the distinction between acts and relations of law which were peculiar to themselves, and those which they had in common with other nations. To the former they gave the name of *jus civile* (in its narrower sense: not *all* law that belonged to Roman citizens, but law that belonged *only* to Roman citizens): the latter they called *jus gentium* (law of nations, but very different from our *international* law, to which the Latin *jus fetiale*, or law of heralds, made some approach). This distinction gained importance for the Romans, as they came more and more into connection with foreigners. They saw too that the *jus gentium*, being common to all

nations, had its foundation in a conformity to universal reason and justice. And they learned to regard such conformity, where it could be shown to exist, as proof that a rule of law belonged to the *jus gentium.*

The liberalization of the law during the republican period was largely a progressive limitation of the *jus civile* and extension of the *jus gentium.* It was effected to a great extent by the agency of the prætor, and through the actions or legal remedies set forth in his annual edict. Here, without formally opposing the old law, he often modified or nullified its working. Thus, when there was a testament suitably authenticated, but made without the formalities above mentioned, the prætor allowed the successor named in it to receive the estate, not as *heres* (heir), but as *bonorum possessor* (actual holder of the property) with the same practical rights *as if* he was an heir. So, where a person had bought a horse or a house without the ceremonies of mancipation, he was only *bonorum possessor,* not *dominus* (owner), until undisputed possession for one or two years had made him owner by usucapion; but in the mean time the prætor allowed him to sue and be sued, *as if* by usucapion he had become owner.

We see here the use of legal fictions, which are found to an equal or greater extent in English law: most remarkably in the fictitious collusive procedure of a common recovery, by which the judges nullified a statute which Parliament had refused to repeal. Such cases make it evident that the law-making power, which resides in the people, is not always exercised in the way of direct legislation, but to an important extent through the action of the courts. There is in every country a great deal of law, recognized and enforced, which never came from a legislator or a legislature, but has grown up in the practice of the courts. This law may even run counter to the legislative; but in such cases it does not usually maintain a direct opposition: it rather seeks its end by some indirection, fiction, or evasion. In this country it has a means of attack, more open and effective, in the power of pronouncing on the constitutionality of any statute.

THE Roman law in the time immediately succeeding the legislation of the Twelve Tables was of a very simple character. This is only what we should expect to find. The complexity of a law-system must depend on the complexity of the relations which are to be

regulated by it. In a petty republic, having all its territory within a day's march of the capital, among a population of primitive life and manners, confined to a few branches of industry, and holding little intercourse with outside peoples, the law must have been very different from the highly-developed system of the later republic, whose dominion extended over a large part of the world's area, and included nearly all of the world's civilization. But you may be less prepared to hear that this simple law of the early Romans was of a very formal character. Almost all actions which the law recognized as valid, as creating rights and obligations among men, had to be performed in a certain fixed way, with prescribed words and ceremonies; and a deviation in any particular from the established form destroyed the validity of the whole transaction. Let us look at some examples illustrating this marked feature of the early Roman law.

And, first, let us suppose that a man wishes to recover a money debt of ten thousand pounds, which he claims to be due to him. Under the later law, as briefly described in the last lecture, the creditor would bring his debtor into the prætor's presence; and the prætor, after hearing the allegations of the two parties, would make out a *formula*, or written statement of the claim, something in this style: "Let Titius be judge. If it appear that Numerius is bound to pay ten thousand pounds to Aulus, then condemn Nume-

rius in the sum of ten thousand pounds; if not, acquit him." This formula he would then place in the hands of Titius, the appointed judge, for investigation and decision. But in the early period of which we are now speaking, in the first centuries of the republic, the procedure was quite different. When the parties came before the prætor, the plaintiff set forth his claim in these prescribed words: *Aio te mihi* x *millia æris dare oportere* (I affirm that you are bound to pay me ten thousand pounds); to which the defendant replied in similar terms: *Nego me tibi* x *millia æris dare oportere* (I deny that I am bound to pay you ten thousand pounds). The plaintiff then said: *Quando negas, te sacramento quingenario provoco* (since you deny the claim, I challenge you in a wager of five hundred pounds); and the defendant again responded: *Quando ais neque negas, te sacramento quingenario provoco* (since you affirm the claim, and do not deny it, I challenge you in a wager of five hundred pounds). Each party then deposited the five hundred pounds, the amount of the *sacramentum*, or wager; or, if it was not deposited, gave security for its payment. The two parties then summoned each other in terms which are not reported by our authorities, but were doubtless fixed and constant, to appear on a certain day before the standing court of ten judges (the decemviral court), to try the issue thus joined between them. You will observe the very singular shape which is here given to

the controversy. It is reduced to a wager, a judicial bet. The plaintiff bets five hundred pounds that his claim is a just one, and the defendant bets five hundred pounds that it is not just. And the question, as it comes before the decemviral court, is simply this, which of the two parties ought to win and which to lose in the wager? To decide that question, they are obliged to determine the justice of the claim; but this, though in reality the main point, is in form secondary and subordinate. The formal judgment is, that this party or that is winner of the bet. If it is the defendant, he receives the five hundred pounds staked by his adversary. If it is the plaintiff, he receives, besides the five hundred staked by defendant, the sum of ten thousand, which the court incidentally decides to be due to him.

It is important to notice a very serious danger to the plaintiff which was involved in this procedure. He has claimed that the defendant owes him ten thousand pounds, and has staked five hundred pounds on the justice of his claim. Suppose, now, that the court, on a full examination of the case, are satisfied that the defendant is indebted to the plaintiff, but that the amount of the debt is nine thousand nine hundred instead of ten thousand pounds. Plainly the court must give judgment against the plaintiff. The question for them to decide is, whether he has won his bet or lost it. His bet was, that the defendant owed him

ten thousand. Now, a man who owes only nine thousand nine hundred cannot be truly said to owe ten thousand. The plaintiff, therefore, has lost his bet, and, consequently, his cause. But can he not pay the *sacramentum* which he has forfeited in this suit, and then bring a new suit for nine thousand nine hundred? No, the law will not allow him this second chance. He has exhausted his right in the suit already decided: he has subjected all his money-claims against the defendant to the ordeal of a judicial examination; and the law will not permit him to repeat the process. A man is bound to know his own rights, and to respect the rights of others. If I over-estimate my own rights by demanding what is not really due to me; if I invade my neighbor's rights by suing him for what he does not really owe me; I am justly punished by losing the right which, through my exaggeration of it, I have turned into a wrong. So, doubtless, the old Romans were accustomed to reason. Another circumstance may be mentioned which illustrates the rigorous formality of this early law: In the formal statement of his complaint, it was necessary for the plaintiff to take care that he stated something which was not only true in itself, but was distinctly recognized in the Twelve Tables as ground for an action. Thus we are told by Gaius that a man who brought a suit *de vitibus succisis* (for vines cut down) against somebody whom he charged with cut-

ting down the vines in his yard, was non-suited at the outset: he ought to have made it *de arboribus succisis:* the Twelve Tables authorized suits *de arboribus succisis*, which would include vines, but said nothing as to a suit *de vitibus succisis.*

If the object of the plaintiff's suit was to recover a piece of ground, which he claimed as his own, the procedure was still more elaborate. The parties having come before the prætor, the plaintiff began: *Fundus qui est in agro qui Sabinus vocatur, eum ego ex jure Quiritium meum esse aio: inde ibi ego te ex jure manu consertum voco* (the piece of ground lying in what is called the Sabine land, that piece of ground I affirm to be mine by law of the Quirites: for which cause I summon you there to join hands in process of law). This joining hands in legal process refers to a joint seizure of the same object at the same time by both parties, each declaring himself the owner. The defendant replied in similar terms: *Unde tu me ex jure manu consertum vocasti, inde ibi ego te revoco* (as you have summoned me to join hands in process of law, for the same cause do I again summon you to the same place). Whereupon the prætor said: *Suis utrisque superstitibus praesentibus, istam viam dico: inite viam* (having each one of you his own witnesses present, I bid you take your way thither: enter upon your way). It would seem that, in the earliest times, the parties, on receiving this mandate of the prætor,

actually repaired to the disputed ground, and there, in the presence of witnesses, solemnly asserted their claims of ownership. But, after a time, they contrived to manage matters in a more convenient, though not less formal, way. By previous concert, before coming to the prætor, they took a clod, or lump, of earth, from the disputed ground, of which it was to serve as a representative—somewhat like the brick which the old Greek Scholasticus carried about as a specimen of the house that he wanted to sell. The clod was deposited somewhere in the neighborhood of the tribunal, so that, when the *inite viam* was heard, a few steps sufficed to reach it; and presently, at the words *redite viam* (take your way back), uttered by the prætor, the parties returned, bringing the representative clod with them. The plaintiff then said: *Hunc ego fundum ex jure Quiritium meum esse aio, secundum suam causam sicut dixi: ecce tibi vindictam imposui* (this piece of ground I affirm to be mine by law of the Quirites, in accordance with its title as I have stated: take notice, that I have laid upon it the sign of power). This *vindicta*, or sign of power, was a rod, or wand, symbolizing the owner's power, which, as he spoke, he laid upon the clod. The defendant then followed, uttering the same words, and accompanying them with the same significant action. The prætor now interposed to prevent a seemingly imminent personal collision: *discedite ambo* (stand apart, both of you). The plaintiff

obeyed, but, as he did so, addressed the defendant: *Postulo anne dicas qua ex causa vindicaveris* (I ask whether you can show cause for your assertion of power); to which the latter replied: *Jus peregi sicut vindictam imposui* (I have exercised a legal right in laying on, as I did, the sign of power). The plaintiff then said: *Quando tu injuria vindicavisti, quingenario te aeris sacramento te provoco* (since you have made a wrongful claim of ownership, I challenge you in a wager of five hundred pounds); and the defendant rejoined: *Similiter ego te* (in the same way I challenge you). The parties then, having deposited, or given security, for the five hundred pounds, summoned each other to appear, on a fixed day, before the decemviral court for the trial of their judicial wager; the prætor, at the same time, requiring the defendant *dare praedes litis et vindiciarum*, i. e., to give security that, if the decision should be against him, he would deliver up the ground, of which, for the present, he retained possession, without injury to its value, together with all profits which might accrue from it in the mean time.

We will add one or two other examples of elaborate ceremonial required by this early Roman law. There were certain species of property which could not be effectually sold without the observance of a formal proceeding called *mancipatio*. These were lands, buildings, slaves, horses, cattle; that is, real estate, and the persons or animals used in cultivating

it: these were the species of property most used and most dealt in by the early Romans, who (as Niebuhr says) are to be thought of, not as a nation of warriors, but a nation of farmers. If a man wished to purchase another man's horse, there must be present at the transaction, besides the buyer, seller, and horse, not less than six Roman citizens of full age, five to serve as witnesses, while the sixth held a pair of brazen scales, and was called *libripens* (weigher, weigher in a balance). Before this assemblage the buyer, taking hold of the animal, said: *Hunc ego equum ex jure Quiritium meum esse aio, isque mihi emptus est hoc aere aeneaque libra* (this horse I affirm to be mine by law of the Quirites, and he is purchased by me with this piece of brass and brazen balance). He then struck the scales with a piece of brass (i. e., a copper coin), and handed it to the seller. Of course, this copper piece was only a representative, or symbol, of the purchase-money, which could be paid at any time, or in any way, agreed upon between the parties, though, doubtless, in the primitive period, when this usage had its origin, the money-piece was actually weighed in the scales, and paid over on the spot. The name *mancipium*, or *mancipatio*, applied to the transaction, signifies taking with the hand, and refers to the act of the buyer laying hold of the object which he declared to be his purchased property. The kinds of property (lands, buildings, slaves, horses, cattle) for which this

transaction was required, were called *res mancipi* (things of *mancipium*, things subject to *mancipium*): all other kinds were called *res nec mancipi* (things not subject to *mancipium*). If a man bought a sword, or a spade, paid the price, and took the article, he became absolute owner, always supposing that the seller really owned it before him. But not so, if he bought a horse, an ox, a slave, a farm: though he had paid the price, and received possession, he did not become owner, unless he went through the formal *mancipatio*. He had the thing *in bonis* (among his effects), but he had no *dominium* (or ownership): in view of the law, the seller was still the real *dominus* (or owner). I hope you will bear in mind this practice of *mancipatio*, and its necessity in the transfer of *res mancipi*, for we shall be obliged to refer to them more than once as we proceed.

Again, if a man wished to make a will, or testament, which should be recognized as valid, he had to go through with a ceremony closely resembling the one just described. He had to make what was in form a sale of his estate by mancipation. Five men must be present as witnesses, with a sixth man as *libripens* (or balance-holder), all Roman citizens of full age. Then, too, there must be a *familiae emptor* (i. e., purchaser of the estate), corresponding to the buyer in an ordinary mancipation. But, instead of the words before given (this horse, or this ground, I affirm to be mine by law of the Quirites, etc.), he used the following

form, addressing himself to the testator: *Familia pecuniaque tua endo mandatelam, tutelam, custodelamque meam, quo tu jure testamentum facere possis secundum legem publicam, hoc aere [aeneaque libra] esto mihi empta* (in so far as you by public law have the right to make a will, let your estate and money be brought into my charge, guardianship, and custody, being purchased by me with this piece of brass [and brazen balance]). He then struck the scales with the piece of brass, and handed it to the testator; whereupon the testator, holding in his hands the written will, said: *Haec ita ut in his tabulis cerisque scripta sunt ita do, ita lego, ita testor, itaque vos Quirites testimonium mihi perhibetote* (these things, as they stand written in these waxen tablets, I so grant, so leave, so bequeath, and so do you, Quirites, bear me witness). There can be no doubt that, in the primitive time, when this mode of making wills had its origin, it was intended and understood as an actual sale. The person fixed upon as heir was the purchaser, the *familiae emptor:* he bought the estate, of course, for a mere nominal price, and thus became owner, not immediately, but eventually, on the death of the testator. His right of ownership, however, was limited by the obligation, assumed in the very act of purchase, to fulfil the directions of the testator, as set forth at the time in the tables of the will; but afterward the transaction ceased to have this literal character: it was no

longer regarded as an actual sale, conferring on the purchaser a title to the estate. It was not necessary, then, that the destined heir should serve as *familiæ emptor:* any other citizen could act this part in the performance. Thus the whole ceremony came to be only a means for the solemn authentication of a last will or testament. If a man made a will without any formalities, or if the formalities used were defective in any particular—if there were only four witnesses instead of five, if any of the witnesses were under age, and the like—the will had no legal validity. The person named in it as heir was not *heres* in view of the law: even if the estate came into his hands, he was only *bonorum possessor* (actual holder of the estate): he had no *dominium* (ownership) over it, as he would have had if, by a properly authenticated will, he had been made *heres* (heir).

It must not be supposed that formalities such as those now described were wholly useless. They secured a considerable number of competent witnesses for every legal transaction—a point of especial importance before writing became common. They made it a matter of some little difficulty for a man to subject himself to a legal obligation. The necessity of bringing so many persons together, and of calling up to mind all these precise forms of speech and action, invested the business with a character of gravity: it gave a man time to reflect, and suggested that he

ought to reflect, on what he was doing. One must have at least a pretty definite intent to lay himself under obligation, if he took so much pains to do it.

We are now prepared to appreciate a distinction which figures largely in the law-writers of Rome, as it is one of much importance in the history of Roman law—the distinction between rules and usages of law which were peculiar to themselves, and those which they had in common with other states and peoples. The former they called *jus civile* (the special law of Roman citizens): the latter, *jus gentium* (the general law, recognized and used by other nations as well as themselves). By "law of nations" we generally understand "international law;" but the Latin *jus gentium* had no such meaning. It can hardly be said that the Romans had the idea of international law: if in their *jus fetiale* (or law of heralds, as agents of communication between different states), they make some approach to it, it is only a distant approach. By *jus gentium* they always intend those principles and practices of law which are found in all communities, or at least in all not utterly barbarous. The term *jus civile* is not used with the same uniformity. It sometimes denotes the whole law to which Roman citizens are subject, whether peculiar to them or not. But as opposed to the *jus gentium*, it has the restricted sense just given, the law peculiar to Roman citizens. Thus buying and selling with payment of price and transfer

of ownership belong to the *jus gentium*. But *mancipatio*, buying and selling with the formalities implied in that term, belongs to the *jus civile*. So the making of a will, by which a person appoints a successor to his estate, belongs to the *jus gentium*. But the making of a will with five witnesses, *libripens*, *familiae emptor*, etc., belongs to the *jus civile*. It is easy to see how this idea of a *jus gentium* should have been more and more impressed upon the Romans with the progress of their state. As their power extended, they were brought more into contact with other races and nations. Many Roman citizens were dispersed in alien lands and cities: aliens in still larger numbers crowded into Rome itself, or into other places which had Roman citizenship. It became a constantly-growing necessity for Roman magistrates to take cognizance of law-cases where one or both parties were aliens, where consequently alien law had to be considered. As early as the year 247 B. C., a *prætor peregrinus* was appointed in Rome, to administer law in such disputes. These *peregrini* (or aliens) could neither own any thing nor do any thing *ex jure Quiritium* (by law of the Quirites): from the whole *jus civile*, in the narrow sense of the term, they were necessarily excluded: they could not sue nor be sued, they could not sell a horse nor buy one, they could not make a will nor take an inheritance, according to the forms which have been described. In administering justice among them in their

relations with one another, or between them and Roman citizens, it was constantly necessary to consider what was peculiar to the Roman law, and what was common to it with other systems. Now these latter elements, common to all systems of law, must be founded on universal reasons of justice and necessity. If the effect is universal, the cause must be so likewise. If certain principles and rules are found in the law-systems of all nations, it can only be because they commend themselves as just and necessary to the reason of all men. Hence the Romans soon came to regard this consonance with universal reason as the characteristic, the criterion, of the *jus gentium*. If the question arose whether any principle or rule belonged to the *jus gentium*, they did not think it necessary to examine the laws of all nations known to them, to see if they could actually find it everywhere. They considered whether, on the one hand, it was conventional and arbitrary, or, on the other, essentially reasonable and equitable. They thus identified the *jus gentium* with the *jus naturale*, that law which springs from the universal nature of man and the conditions of human life and society, instead of being the product of local, temporary, accidental, and variable causes.

Let me remind you here that when the period extending from the Twelve Tables to the commencement of a scientific law-literature was first mentioned, it

was said to be marked by the liberalization of the Roman law. The meaning of this expression will now be apparent. In the Roman law as it was constituted by the Twelve Tables, the *jus civile* was the predominant element: in the Roman law as it was found by Q. Mucius Scævola, about 100 B. C., the *jus gentium* was getting to be the predominant element. Principles and usages peculiar to the citizens of Rome had been falling into the background: principles and usages, founded in the nature of things and agreeable to the reason of all men, had been rising into greater prominence. The system had been throwing off the narrowness of its beginnings as the local law of a petty state, and assuming a liberal and universal character suited to the law of a vast empire. There is something remarkable in the frankness with which the Romans recognized the defects of their peculiar law, and conceded its inferiority to a broader and freer system. There is something remarkable also in the cautious, conservative manner by which, without any direct attack on the old system, they contrived to undermine and destroy its validity. The law of the Twelve Tables, in the time of Cicero or Gaius, was in much the same condition as the king or queen in England now—greatly venerated in appearance, but almost powerless in reality.

The change of which we are speaking—the liberalization of the Roman law—was effected chiefly through

the agency of the prætor. The custom arose at an early period—just how early it is impossible to say—for the prætor at the outset of his year of office to put forth an edict, or public statement, as to the way in which justice would be administered during his official term. The prætor's edict was not a law or a body of laws: it had no pretension to that character: it was a body of information, designed especially for the benefit of suitors, of persons wishing to obtain the help of the law, showing them by what means and under what conditions they could obtain the remedies desired. It is probable that the edict soon came to have a somewhat uniform character: each prætor would naturally follow in the main the track of his predecessor, adopting in most points the edict of the preceding year, only making here and there such changes as seemed to him expedient. But how could the prætor with his edict exert any influence to change the existing law? One or two illustrations will serve as an answer to the query. We have seen that if a will was not executed with the precise formalities already described, it had by the law of the Twelve Tables no validity whatever. But the prætor in his edict said: "If by a will made without any formalities, but sealed by seven competent witnesses, a person is appointed heir, I will give him possession of the estate after the death of the testator, and will allow him to sue and to be sued as if he were an heir." The

prætor does not set himself against the Twelve Tables: he does not call the document a valid will: he does not give the name *heres* to the person designated in it: he does not confer on him the *hereditas* or even the ownership of the estate. He only makes him *bonorum possessor* (holder of the property); yet while he denies him the name *heres*, he gives him in fact the powers and rights of an heir. In form, he does not break with the old law; but he completely changes its practical working. Again, if a man had bought a horse and paid for him, without the ceremony of mancipation, he gained under the Twelve Tables no right of property, at least not until he had had the animal in his possession for an entire year. For in such cases even the Twelve Tables allowed an undisputed possession of one year to cure the defective title: the man acquired ownership by *usucapion*, as it was called, by taking and using for a complete year. But, before that time was out, the old law gave him no protection. Here again the prætor interposed to afford relief. If, after a shorter time, as three months, the seller attempted to take back the horse, the buyer was assured, by the prætor's edict, that he might sue as if he had become owner by *usucapion*. He does not recognize him as owner (*dominus*): that would be contrary to the Twelve Tables. He only treats him as if he were owner: permits him to exercise the rights which he would have if he were owner. Here, too, without

formal contradiction of the old law, there is an essential change in its practical working.

I give these as specimens to show how it was possible for the prætor to act upon the law, to mitigate its harshness, to break down the barriers of its exclusiveness, to liberalize it in principle and practice. The examples illustrate also the use of legal fictions. The person named in the informal will is not an heir, but for practical purposes is *feigned* or supposed to be one, is treated as if he were one. The person who bought the horse by an informal purchase and has had him for only three months, has not acquired ownership by *usucapion*—that would take a twelvemonth—but is treated as if he had acquired it: the procedure is based on the *fiction*, the supposition (admitted not to be a fact), that he has become owner.

It must not be supposed that these processes are peculiar to the Roman law. Legal fictions of a much grosser kind abound in the procedure of the English law. Several of the most common actions (suits at law) proceed upon fictions, fictitious allegations of the plaintiff which the defendant is not permitted to dispute. Thus, the action of trover and conversion, the action of trespass *vi et armis*, and above all the action of ejectment, where John Doe, a fictitious plaintiff, brings a fictitious suit against Richard Roe, a fictitious defendant. These fictions have often served to remove difficulties and inequalities in the working of the ex-

isting law. A remarkable instance is found in the old procedure of a common recovery, as it is called, by which the English judges contrived to defeat the operation of an act of Parliament, the repeal of which it had been found impossible to obtain. By a statute enacted in the reign of Edward I. (1284), the holder of an entailed estate was restrained from alienating it. The grant of land which created an entailed estate was made to the person named (say William Stiles) and the heirs of his body. It was this last expression —to William Stiles *and the heirs of his body*—which gave to the estate its peculiar character. And the statute just referred to did nothing more than require that this language of the grant should be strictly construed and literally complied with. William Stiles then was not at liberty to sell the land so granted or to give it away; he must keep it while he lived, and at his death leave it to a child of his, an heir of his body. This heir, again, was under similar restrictions; he could not alienate the land; he must let it pass at his death to a child of his, or at any rate to a descendant of William Stiles. And so on, from one successor to another. The estate was confined to actual descendants of the original grantee, the person who first received it as an entailed estate for himself and the heirs of his body. If now the issue of William Stiles failed, either at his death or after any number of successors, so that there was no longer a descendant of

his who could claim the succession, the entail was then extinguished, the estate must revert, fall back into the hands of the grantor, the person who created it by his gift as an entailed estate, or to his heirs, his representatives living at the time of such reversion. Now, this tying up of entailed estates was found to be a serious inconvenience—an inconvenience to the holders, who for one reason or another often wanted to sell them; an inconvenience to other people, who often wanted to buy them; an inconvenience especially to creditors, who could not use an entailed estate of the debtor as a means for obtaining the payment of their claims. The Commons, therefore, made repeated efforts to repeal the statute; but they were always defeated by the Lords, who are generally the creators of these entailed estates, and did not wish to lose the advantage of their eventual reversion. The statute continued in force for about two hundred years. But, in the reign of Edward IV., the judges allowed the introduction of a fictitious procedure, a collusive procedure, by which the alienation of an entailed estate could be effected.

To describe this procedure, let us suppose that A is the holder of an entailed estate which he wishes to sell, and B is a buyer who wishes to purchase it. B now commences a suit (of course a collusive suit) against A, alleging that A has no title to the estate which he holds; that he, B himself, is the person really

entitled to it. To defend his title, A brings into the court a person whom we will call C, a man of low birth and no property, usually the crier of the court, and says that he got the estate from C, that C was the grantor of the estate, and that when he granted it he warranted the title, that is, he engaged to defend it, to prove its soundness against any one who might hereafter claim the land as his own. He therefore falls back upon C as his warrantor. On being questioned by the court, C acknowledges that the statement is a true one, that he did grant the estate to A, and did warrant the title, and is therefore under obligation to maintain it now. But, when called upon to do so, he has nothing to say; he allows judgment to go against himself by default. Judgment then is given in favor of B, sustaining his claim, and authorizing him to enter on the land in question. As for A, who is thus unfortunately dispossessed through the default of C his warrantor, the court decrees him a compensation from C in lands of equal value—which, of course, he has the legal right to take if he can find them.

It may have occurred to you, in hearing this description, to ask how so shallow a trick could be countenanced by the highest judges of the land; or how the judges could be permitted to nullify an act of Parliament, a law of the land, by so transparent an evasion. The most obvious answer would be that the

people were too well pleased with the result to be very critical as to the means by which it was accomplished. If the judges had taken this course to defeat a law which was dear to the people, they would certainly have roused a storm of indignant opposition. In this matter they were doing the will of the people, acting as the servants of the people, and hence it was that their proceedings were received with general acquiescence, and became part of the English law. It may throw light on the point, if we inquire what it is that gives force to an act of the legislature; how is it that the doings of a few score of men in one or two chambers are binding on millions of their fellows. The answer given by all republican thinkers, and by many who are not republican, is, that it is ultimately the will of the people which gives force to an act of the legislature; the people have willed that an assemblage of men organized in such and such a way shall make laws for the entire community; or, rather, the people have chosen to exercise the law-making power through the agency of such an assemblage specially intrusted with the work. But the question then presents itself: Does a people exercise the law-making power only in this way; or has it other means and agencies for making laws? We have already spoken of the English law as being to a great extent unwritten, that is, never embodied in written statutes. And there is no nation that has not a great deal of this unwritten law. No

code was ever so complete as to embrace all the law of a people, all that in the courts was recognized and enforced as binding. No legislature was ever so active as to make its statutes cover the entire field of admitted legal obligation. What is it that gives authority to all this unwritten (unstatutory, unlegislative) law? Many say, it is the tacit consent of the legislature, the implied or presumed consent of the legislature. But a legislature is chosen for positive action: its mere silence carries no binding authority. It is the agent of the people for the laws which it actually makes, not for the laws which it suffers to be made elsewhere. If in all nations a great deal of law has sprung up and found recognition in the practice of the courts, without the intervention of a legislature, this fact alone is enough to prove that a people has other means of law-making besides the action of a legislative body. It seems to me impossible to frame a theory of this subject which shall be in harmony with all the facts, unless by recognizing in the courts, in judicial practice, a means by which the law-making power of a people is to some extent exercised. It is clear that the English people exercised such a power through the judges in the instance just given; and that the Roman people exercised such a power through the prætor in cases like those before described.

It must be observed, however, that this agency of the courts never sets itself in direct opposition to a

written, statutory law. If it sets aside or does away with such a law, it accomplishes its end by indirect means, by fictions or evasions of different kinds. In this country it has a peculiar weapon so effective as almost to supersede the use of any other. Our States, as separate governments and as a united government, have written constitutions, which, while they subsist, are binding on legislatures as much as on courts of law or on private individuals. If a legislature passes a law which conflicts with the constitution, it transcends its powers, and so accomplishes nothing. The unconstitutional law is an unlawful law, that is, it is no law at all. Nobody has a right to make it, and nobody has a right to enforce it. A court therefore is, and from the nature of our government must be, authorized to ignore, refuse to recognize, and thus practically to set aside, any legislative act which is inconsistent with the constitution. Now, if a constitution is interpreted with some latitude, and particularly if the spirit of a constitution is regarded as binding not less than the letter, almost any thing unjust or bad may be represented as unconstitutional. And we find in fact that those who for any reason dislike a law, almost always represent it, and doubtless generally believe it, to be unconstitutional. We may presume, therefore, that in cases where the English judges or the Roman prætors, under the influence of a similar feeling, would have defeated a law by fiction or eva-

sion, our American courts would set it aside as unconstitutional. Yet with us a popular feeling which is permanent and decided enough to operate through the courts would be pretty sure to find an easier organ in the legislature: the obnoxious law would be repealed by legislative act. The statute law would thus be brought into conformity with the settled will and convictions of the people; and there would be no necessity for a conflict, which is always undesirable, between the law as enacted by the legislature and the law as enforced by the courts.

In the next lecture we shall take up the system of the Roman law, beginning with the doctrine of *status*.

LECTURE V.

LAW OF STATUS AND FAMILY RELATIONS.

THREEFOLD division of STATUS (capacity for legal rights: 1. As to *libertas:* all men were *liberi* or *servi;* 2. As to *civitas:* all *freemen* were *cives* or *peregrini;* 3. As to *familia:* all *citizens* were *sui juris* (as *patres-familias*, with or without wife and children) or *alieni juris* (as *filiifamilias*, subject to a life-long *patria potestas*). In each case the change to a lower position was called *deminutio capitis* (diminution of the law-person), which was *minima* when it was only loss or change of family relation; *media*, loss of citizenship; *maxima*, loss of personal liberty.

I. SLAVERY was referred by Roman jurists to the *jus gentium*, but not to the *jus naturale.*—Usually it began from captivity in war; but by its own nature was hereditary, being inherited from the mother (*partus sequitur ventrem*). The rule *pater est quem nuptiæ demonstrant* was inapplicable to slaves, who could have *contubernium*, but no legal *matrimonium.*—The slave might become free by the *testament* of his master, or by *census* when the master had him enrolled on the list of citizens. But the usual form of manumission was a fictitious suit between a *vindex* of the slave, claiming him as free man, and the master, who allowed judgment to go against himself: a form greatly simplified as time went on.

The slave had no rights recognized by the law, though certain laws (having the nature of police regulations) restrained excessive cruelty to slaves. The slave might, however, receive a legacy or an obligatory promise, acquiring them for his master. He might even enter into contracts binding on his master, as where the master had intrusted him with some business, or had given him a *peculium* to manage, or had derived any actual advantage from his contract.

The manumitted slave was called *libertinus*, and his status was in some respects inferior to that of the *ingenui* or freeborn.

II. ROMAN CITIZENS, besides the rights of the *jus gentium*, which belonged also to aliens, had those of the *jus civile* (in its narrower sense). These last were divided into—1. Those of *connubium*, pertaining to marriage and its incidents, and 2. Those of *commercium*, pertaining to business relations. The people of the Latin cities long enjoyed the *commercium* without the *connubium;* and this condition (*jus Latii*) was afterward extended to other communities, who then received the law-name of *Latini*. After Caracalla (211–217) gave citizenship to the free people of the provinces, the *peregrini* were either persons born outside the empire, or those who had forfeited citizenship by some offence; while the *Latini* were chiefly freedmen manumitted without due regard to legal requirements.

III. The PATRIA POTESTAS lasted through the life of the *paterfamilias*, and for a long time was almost unlimited. The father was entitled to the entire services and acquisitions of the child; he could inflict on him any punishment, could sell him into a kind of slavery called *mancipium*, and had over him even the *jus vitae et necis*. This, however, did not affect the public rights and duties of the son, who could hold any office, civil or military. The *patria potestas* (like the husband's power over his wife in English law) had its root in the sense of family unity, the family appearing as one in the father, its single representative and executive. Under the emperors it began to be limited, both as to personal inflictions and property rights. From Augustus on, the son could acquire a *peculium castrense;* later, a *peculium quasi castrense*. By Justinian's legislation, what the son acquired in public service was wholly the son's; what he acquired with the father's capital or instruments was wholly the father's; what he acquired in any other way was the son's, but subject to a life-long usufruct of the father.

A new *patria potestas* might be created by *adoptio*. This was also called *arrogatio*, when applied to a person *sui juris:* it then required the express assent of the people, later that of the emperor. The adoption of a person *alieni juris* was accomplished by a fictitious suit, in which the natural father forbore to defend his right against the claim of the adoptive father. The effect on the adopted person (at least during the earlier period) was to put him in the same relations to his old family and his new one as if he had been born in the latter.

The *patria potestas* might be terminated by a process, called *emancipatio*, because it involved a sale (which in the case of a son must be thrice repeated) into the *quasi*-slavery of the *mancipium* and a release

from that condition. Both emancipation and adoption involved a *minima capitis deminutio.*

We have now reviewed the history of the Roman law, both before and after the formation of the Corpus Juris Civilis—both in ancient and in modern times. We proceed to look at the Roman law in its substance, to notice in a brief and rapid survey the leading points of the system, the history of which has thus far occupied our attention. In this survey we begin, as the Institutes or text-books of Gaius and Justinian do, with the subject of *status*. By the status (or standing) of a person is meant the position that he holds with reference to the rights which are recognized and maintained by the law—in other words, his capacity for the exercise and enjoyment of legal rights. This capacity the Roman jurists, who had a highly developed doctrine of status, represented as depending on three conditions, *libertas* (or personal freedom), *civitas* (or citizenship), and *familia* (or family relation). Accordingly, they distinguished three kinds of status: 1. In respect to *libertas:* all men were free or unfree. As to the unfree (the slaves), it can hardly be said that they had any status: they had no rights of their own recognized by the law, no rights which they could assert or vindicate by legal processes. But all freemen did not stand on the same footing before the law: some had a more advantageous position than others, according as they differed. 2. In respect to *civitas*. All freemen

were citizens or non-citizens. The rights which pertained to mere personal freedom belonged alike to citizens and aliens. But there were other rights, belonging to the *jus civile* in its narrower sense, as explained in the last lecture, which were open to citizens only, while aliens living under the *jus gentium* (or common law of all nations) were excluded from them. But even among Roman citizens there was a wide difference in capacity for legal rights, according as they differed. 3. In respect to *familia*. All citizens were either *sui juris* (men of their own right), acting for themselves independent of family control, or *alieni juris* (subject to another man's right), subject to the control of one who stood as head of the family. Both enjoyed alike the rights of freemen and of citizens; but there was a great difference between those who were *sub patriâ potestate* (under the power of a father) and those who either had no father living, or had been emancipated from his power. The former were *filii-familias*, children of a family and dependent in their property relations on the head of the family, the *paterfamilias;* while the latter were themselves *patresfamilias*, or heads of families. A man in this position was a *paterfamilias* in the law-sense of the term, though he had neither wife nor children, though his family consisted of himself alone; as, on the other hand, a man with a wife and ten children was only a *filiusfamilias*, if he was subject to the family control

of a living father. You will have observed that, in this threefold division of status, the highest class in each division includes all classes of the division following it. The first division is into *liberi* and *servi* (free people and slaves); in the second, the *liberi* are divided into *cives* and *peregrini* (citizens and aliens); in the third, the *cives* are divided into *homines sui juris* and *homines alieni juris* (independent and dependent persons). If a man lost the position of advantage which belonged to him in any of these divisions, he was said to suffer a *capitis deminutio* (a diminution of the *caput*), a phrase of frequent use and great importance in the Roman law. The word *caput* in this phrase denotes the law-person, the person as invested with all legal rights and powers which belong to him. If the change of status was only a change of family relation, the *deminutio capitis* was comparatively small; it was the *minima capitis deminutio;* the subject of it still retained the rights of a freeman and a citizen. If the change of status involved a loss of citizenship, this was a much more serious privation; yet it was not the worst which a man could suffer; he still retained the rights of a freeman. Hence the loss of citizenship was designated as *media capitis deminutio.* But a change of status in which a man lost his personal liberty was the greatest and sorest of all: it was the *maxima capitis deminutio:* his legal personality was swept away: no rights, no status remained to

him. (The loss of freedom then is the *max. cap. dem.;* the loss of citizenship, the *media cap. dem.;* and the loss or change of family relation, the *minima cap. dem.*)

But we must attend more particularly to these three kinds of status; and first, to that in which freemen are distinguished from slaves. The condition of freedom requires no special explanations. But something must be said about slavery as it existed under the Roman law. The subject, happily, is not so interesting for us now as it was a few years ago, when a system of slavery much resembling that of the Romans covered more than half the area of the United States, and seemed likely to extend its power over the West India Islands, over Mexico and Central America, and perhaps even beyond the Isthmus. Yet an institution which cast so terrible a shadow over our recent past, and still so strongly affects the present of our country, can be no matter of indifference to us: it lends an interest, more than the merely historical or antiquarian, to the similar institution of the Romans. The Roman jurists recognized slavery as belonging to the *jus gentium*, for they found it among all nations of which they had any knowledge. But they did not in this case, as in most others, identify the *jus gentium* with the *jus naturale.* They acknowledged in explicit terms that slavery was an arbitrary institution, the creature of force and not of right, that it had no foun-

dation in reason and equity, and therefore formed no part of the *jus naturale*. They did not hold that a superiority of birth or race, of intelligence or civilization, gave any right, gave any thing but the mere actual power, to deprive the inferior of what they regarded as his natural condition of freedom. As for the idea that slavery was a real advantage to the enslaved, something which they ought to accept with gratitude and dread to lose, it seems never to have occurred to any Roman jurist. Perhaps masters then were different from the patient and placable patriarchs of recent times.

How did slavery arise? As to the origin of slavery, where it was not an inherited condition, it was most frequently the result of war. According to the ancient theory of war, the captor in his treatment of the captive was not bound by any rule of right: the relation between them was one of mere force; if that force was used to take his life, the captive could not complain of a rigor which in the opposite case he might himself have exercised. If he received life even under the conditions of slavery, it was more than he was entitled to claim. But Roman citizens made prisoners by their fellow-citizens in civil war, were not reduced to slavery; this treatment was reserved for alien enemies. It was a natural consequence of the theory of slavery that the condition should be hereditary. If the slave exists only for the master, if all

products of natural powers or activities belonging to the slave are the absolute property of the master, the master's right of ownership must extend to the children of the slave, the fruit of his body. Inherited slavery was a *maternal* inheritance. The famous maxim *partus sequitur ventrem* (the child follows the mother's condition), of which we used to hear so much, was a maxim of the Roman law. The child of a female slave had no father recognizable by the law, any more than the child of a public prostitute. For the other law-maxim *pater est quem nuptiae demonstrant* (he is father whom a lawful marriage points out as such; that is, the mother's lawful husband is the presumed father of her child)—this maxim could have no application to the slave. No such thing as marriage among slaves was, or could be, recognized by the law. As slaves were wholly subject to the disposal of their masters, no unions having the character of permanence or sacredness could exist among them: such a union, if it existed, would abridge the master's power of absolute control. Among slaves there could only be *contubernium*, cohabitation of the sexes for a longer or shorter time, but no legal *matrimonium*.

How could slavery be terminated? There were different modes of manumission, as by census, when the master caused his slave to be enrolled as a freeman on the list of citizens made out by the censors; and by testament, when the master in his will gave direc-

tions binding on his heir that the slave should be made free. But the most common way, and the one which gave occasion to the name of manumission, was, in its origin at least, a pretended or collusive suit. The plaintiff in this suit was a Roman citizen who maintained the cause of the slave, asserting him to be of right a freeman; he was called the *vindex* of the slave: the master himself was the defendant. The proceedings were much like those described in the last lecture, as used under the earlier law when the plaintiff claimed for his own a horse or other piece of property which was in possession of the defendant. The parties having appeared at the tribunal of the prætor, the *vindex* laid a rod on the head of the slave; but instead of saying, "This man is *mine* by law of the Quirites," he said in formal terms, "This man is *free* by law of the Quirites." The master, then, who in a real suit would have said, "This man is mine by law of the Quirites," pronounced the words, "*hunc hominem liberum volo*" (I wish this man to be free), at the same time seizing the man, whirling him round and letting him go with a push out of his hand. This last movement, it is said, gave rise to the name *manumissio* (sending from the hand). The prætor, of course, as the defendant had failed to maintain his right, must give judgment in favor of the plaintiff, that is, in favor of freedom. The proceedings were afterward made more and more informal. First, the prætor's lictor

took the place of the *vindex:* then the lictor was dispensed with; and, finally, it was enough for the master to come with his slave before the prætor wherever he could find him, at his private house, or even in the street, and the prætor having heard the master's wish would declare the slave a freeman. The power of the master to manumit his slaves was originally unlimited; but in the times of the empire it was restricted by several laws founded on political or economical reasons; yet the manumission of a slave was not always invalid when inconsistent with these laws: in some instances the only effect was to make his condition as a freeman less advantageous than it would otherwise have been.

What was the working of slavery on the legal rights of the person enslaved? It was, as we have already seen, to destroy them altogether. Practically it reduced him to a chattel, the property of his owner, subject like a horse or a dog to his master's absolute will and disposal. It used often to be said, by apologists for American slavery, that it did not divest the slave of personality or reduce him to a chattel: it only gave the master a title to all the labor of the slave and of his offspring: this title it was, and not the man himself, which could be disposed of as property. No doubt, the Southern laws recognized the *moral* personality of the slave, for they punished him for his crimes. But we are speaking of *legal* personality, personality invested with legal rights, which can be as-

serted and maintained by process of law. No such personality was allowed to the slave, either by Roman or American law. It is no answer to say that the master was restrained by law from extreme maltreatment of his slave. There were such laws among the Romans and in our Southern States; but they were police regulations, designed to secure the community from the dangers of a servile insurrection or from brutalizing exhibitions of cruelty: they no more recognized legal rights in the object protected, than do similar regulations for the prevention of cruelty to animals. It is further true that, among the Romans, the slave was allowed a certain agency in legal transactions; but it was only as his master's instrument. He could take a legacy which some one had bequeathed to him; but he acquired it for his master, not for himself. He could enter into a contract by which the other party was bound to give or to do something; but the obligation was to give it to, or do it for, the master. In certain cases he could even enter into a contract by which his master was bound to give something to, or do something for, the other party. Thus, if his master had expressly authorized him to conclude a certain contract, he could always do so with binding force. If his master had a trading-vessel and appointed him supercargo, his contracts made in that capacity were binding on the master. If his master, having any business to be carried on, gave him the charge of it,

his contracts made in carrying on that business were binding on the master. The master was always bound by a contract of the slave, in so far as he had reaped an actual advantage from it. It was not uncommon for a master to put into the hands of his slave a certain amount of capital (called a *peculium*), which the latter was to use in his own way and make what he could from it: in that case the master, who, if there were any profits, had the legal title to them, was also liable for any debts that might be incurred, but only to the extent of the *peculium* which he himself had advanced: he was considered as having authorized his slave to hazard that amount of capital, to incur that amount of indebtedness, but nothing more.

We have thus glanced at some prominent points in the legal condition of the Roman slave. It ought to be added that, among freemen, a distinction was made between the *ingenui* or freeborn, and the *libertini* or born slaves who had been made free by manumission. The *libertinus* (the freedman) was subject to various political disabilities; he was also bound by special private obligations to the person and family of the *manumissor* or (as he was also called) *patronus;* so that his position was in a marked degree inferior to that of the *ingenuus* or freeborn person.

We pass on to the second species of status, that in which freemen are distinguished as *cives* or *peregrini* (citizens or aliens). The difference in public or politi-

cal rights between citizens and aliens was very important in the times of the republic, but became insignificant under the empire. It is a matter of public law, and therefore does not concern us here; what we have to consider is the difference between the two classes in respect to private law. The general distinction has been already stated: the *peregrini* or aliens had only the rights which belonged to the *jus gentium*, the rights which are recognized and maintained in the laws of all nations. They were debarred from all rights which were peculiar to the *jus civile*, in its restricted sense, those rights which in form or character were distinctively Roman. These latter rights the Roman jurists were accustomed to group under the two heads of *connubium* and *commercium*. The word *connubium* denotes properly the right to intermarry with Roman citizens; and hence to contract a Roman marriage, according to the peculiar forms and with the peculiar incidents and effects of marriage between Roman citizens. Chief among these incidents or effects was the *patria potestas*, or life-long control of the father over his children, which, as we shall soon see, was among the most remarkable peculiarities of the Roman system. In general, the *connubium* embraces the peculiar rights of Roman citizens, so far as they pertain to family relations. The *commercium*, on the other hand, embraces all those which pertain to business relations: thus the right to sue in cases where the plaintiff had

to claim something as his *ex jure Quiritium*, the right to buy or sell with mancipation (as described in the last lecture), the right to engage in certain other contracts of peculiar form, the right to make a valid Roman will, to appoint an heir, to be appointed heir in the will of another, and even to act as witness to a will. There was a practical reason for making this twofold classification of rights, into those of *connubium* and those of *commercium*, because they were often separated in fact. While the citizen enjoyed both kinds alike, and the alien in general was excluded from both alike, there was a favored class of aliens who had received one of them without receiving the other, who, though excluded from the *connubium*, were permitted to enjoy the *commercium*. These privileged aliens, who had the *commercium* without the *connubium*, were called Latins (*Latini*): their condition before the law was called Latinity (*Latinitas*, or *jus Latii*). The name arose from the fact that for a long time the people of the Latin cities and the Latin colonies held this position with reference to the Romans. At the close of the Social War, 90 B. C., the Latins, properly so called, were admitted to full citizenship; but the *jus Latii*, as it was named, the privileges which the Latins had enjoyed over other aliens, were conferred about the same time on the Italians north of the Po (the *Transpadani*), and were afterward extended as a favor to particular communities in the provinces. The communi-

ties thus favored were called *Latini*, the word being used as a law-term without reference to the place or race of those who bore it. So, when Vespasian bestowed the *jus Latii* on the whole province of Spain, the Spaniards became Latins in this use of the term. After the time of the Emperor Caracalla, who bestowed Roman citizenship on all the provinces, a little more than two centuries after Christ, the names both of *Latini* and *peregrini* had a greatly restricted application. The name *peregrini* thenceforth denoted chiefly persons born outside the limits of the Roman Empire, but included also those who having once been citizens had in one way or another, usually as a punishment for some offence, lost their right of citizenship. The name Latins was from this time forward nearly confined to certain classes of freedmen—those, namely, who had been manumitted without the proper formalities or in disregard of some legal requirement. The great extension of Roman citizenship made by Caracalla has often been spoken of by historians in slighting terms, as if Roman citizenship had then ceased to have any real value. But this is because they have thought only of the suffrage, or other forms of public activity, and have failed to consider the private-law incidents of citizenship. The disabilities and disadvantages of the *peregrinus* at private law must have been felt by him constantly and in a great variety of ways. There can be little question that Caracalla, worthless as he

was, a profligate and a fratricide, was blessed as a benefactor by millions of his subjects, whom he had relieved from the continual and vexatious burdens of their alien condition.

We come now to the third species of status, that in which citizens are distinguished as *sui juris* or *alieni juris* (the former independent of family control, the latter dependent upon it). The former were *patres-familias*, or heads of families, a name which included even the cases where the man himself constituted the whole family. The latter were *filiifamilias*, dependent members of a family, subject to the *patria potestas* (paternal power) of its head. This power of the father continued ordinarily to the close of his life, and included not only his own children, but also the children of his sons, and those of his sons' sons, if any such were born during his lifetime. It did not, however, include the children of a daughter: these belonged to a different family, the family of their own father, and were subject to his power. Originally and for a long time the *patria potestas* had a terribly despotic character. Not only was the father entitled to all the service and all the acquisitions of his child, as much as to those of a slave, but he had the same absolute control over his person. He could inflict upon him any punishment however severe. He could sell him with the same formalities of mancipation which were used in selling a slave. The child thus sold was reduced to a

peculiar status called *mancipium*, analogous to slavery, but distinguished from it by some differences, the precise nature of which is unknown to us. More than this, the father had the *jus vitae et necis*, the right recognized by law to take the life of his child. Even at the close of the republic, the *lex Pompeia de parricidiis*, a comprehensive statute on the murder of relatives by relatives, was silent as to the killing of a child by his father. Such killing was not a murder; it was not a crime; it was the exercise of a legal right, regarded as belonging to the father. Consider now that the *patria potestas* had this character and extent down to the Christian era: that, in general, every citizen of the republic who had a living father was in this condition, unable to hold property, unable to acquire any thing for himself, wholly dependent on his father in property and person, liable to be chastised, to be sold into a kind of slavery, to be put to death without help or vindication from the law. It was no uncommon thing for men to have passed through every grade in the public service, to have been tribunes and prætors and consuls, to have reached an honored old age, without ever having owned or been able to own a pennyworth of property! It must doubtless have happened at times that the son as *imperator* in war exercised command over a father on whom he was absolutely dependent for his daily sustenance. It is remarkable that the son's position as a citizen was not in the least affected

by his subjection to this despotic control: in all his relations to the state, in all his political rights and powers, the *filiusfamilias* stood on the same footing with the *paterfamilias*. The legal relation between them was one of private, and not of public, law.

You may naturally inquire, how it was possible for the Romans, with their clear practical sense and their strong feeling for equity, to invest the *paterfamilias* with such extensive and dangerous powers. There can be little doubt, I think, as to the answer. The reason which caused the Romans to accept and uphold the *patria potestas*, to maintain it with singular tenacity against the influence of other systems with which they came in contact, must have been the profound impression of family unity, the conviction that every family was, and of right ought to be, one body, with one will and one executive. The *paterfamilias* was not regarded as separate from the other members of the family, as having rights or powers against them; he was regarded as the representative of the family, as the embodiment of its interests and the organ of its activity. Even in his chastisements he was supposed to be acting for the common good. It was precisely the sound sense of the Romans and their feeling of equity that sustained the *patria potestas*; because they furnished the best guarantee that the *potestas* would be sensibly and equitably used. If it had been generally abused, it must have been soon discarded.

As for an occasional abuse, the Romans doubtless thought it better to endure such than to incur the risk of disturbing what they regarded as the natural and normal relations of the family. The English common law, if it has not given to the father such power over his children, has given to the husband a power not much less over his wife, a power founded on the similar idea of a natural normal unity of the married pair. It has been presumed that such power, though always liable to abuse, would in fact seldom be abused; that conjugal affection would cause the husband to use it justly and kindly; or if this motive should be insufficient, that other motives—such as a perception that their interests were really one, or the wish to escape domestic discord, or the salutary fear of public opinion —would be effectual with him. And if, in spite of all these influences, he should occasionally abuse his power, the evil thus done has seemed less formidable than the evil likely to arise if the proper relations of married life were disturbed by a general abolition of this power. I do not say that the old English judged wisely in relation to husbands and wives, or that the old Romans judged wisely in relation to fathers and children. My object is simply to show you the real fundamental reasons of the law in both cases, to point out their essential analogy, and to let you see that this power of the husband or father is not, as many assume, the product of arbitrary or despotic tendencies, but has sprung

from a high conception of the family, as indivisibly and indissolubly one.

But in the period of the Roman Empire, this absolute power of the father was limited by various restrictions: perhaps they were rendered necessary by the growing corruption of the times. The *jus vitae et necis* could only be exercised with the concurrence of the government; and the same was true of all bodily inflictions that went beyond the measure of ordinary chastisement. The selling of a child remained in use only as a form in certain legal transactions. We are told that a creditor who knowingly received a child in pledge for a debt due from the father was visited with severe punishment. At the same time a right to hold property of his own began to be conceded to the *filiusfamilias* in certain exceptional cases. The first exception of this kind seems to have been made in the time of Augustus, and was intended as a favor to the soldiers. All that a *filiusfamilias* acquired as a soldier of the army, the pay he earned, the equipments he received, the share of plunder allotted to him, and the like, he was allowed to acquire for himself, with full right of ownership, as if he were a *paterfamilias.* This kind of property was called *peculium castrense* (*peculium*, the peculiar, separate property of the son, and *castrense*, belonging to the camp, from its military origin). The next step was taken two or three centuries later, and consisted in putting acquisitions made

in the civil service of the state on the same footing with those of the soldiers, and giving them the name of *peculium quasi castrense* (a *peculium* analogous to the military one). Afterward it was enacted that, if a mother died without a will, her property should go to her children and should become their property, though the father was to have the enjoyment of it during his life. And, finally, Justinian put many other acquisitions on the same footing as property inherited from a mother. The principles laid down by Justinian were these: 1. What the son acquired in the civil or military service of the state belonged wholly to the son. 2. What the son acquired by means of capital or instruments furnished by the father belonged wholly to the father. 3. What the son acquired in any other way than the two now mentioned belonged indeed to the son, but the father had the right to use and enjoy it during his life. You will easily see that these changes did not very greatly affect the property relations of a son under the father's power. Aside from acquisitions made in public service, civil or military (which, of course, would fall to comparatively few), all other acquisitions of the son came into the hands of the father, either as his property or for his life-long use and enjoyment. Such tenacity of life had this institute of law, which the Romans justly regarded as the most peculiar feature in their system.

The subjection of a person to a father's power,

which usually began with the birth of the subject person, might also be brought about by processes of law, called *adoption* and *arrogation*. When a person who was *sui juris* placed himself under the *patria potestas* of another, the process was called arrogation. In earlier times it took place before an assembly of the people: afterward it was effected by a written order of the emperor. As all property of the arrogated person became at once the property of his new father, the latter was required to show, in a previous examination, that he was not influenced by sinister motives, and to give security that he would not abuse the power he was acquiring. When, on the other hand, a person already under a father's power was transferred to the *patria potestas* of another, the process was called adoption, though this term was also used in a wider sense, so as to include arrogation. Adoption in the narrower sense required only the assent of the two fathers, the natural and the adoptive father. The proceedings took place before the prætor, and ended in a collusive suit. The adoptive father as plaintiff claimed the child as his under the law of the Quirites; the natural father, instead of resisting the claim, acquiesced in it; and it was of course sustained by the prætor's judgment. The effect on the adopted person was to sever all legal ties which bound him to his original family. He was not only released from the former *patria potestas*, but he lost all rights of inheritance which before belonged to him. By the

law he was regarded and treated exactly as if he had always been a member of the family into which he had come by adoption. The *patria potestas* was so momentous a thing, it affected so long and so deeply the interests of the person subject to it, that adoption, the creation of a new *patria potestas*, could not fail to be an important institute of Roman law. In English law it is quite the contrary. Indeed, it can hardly be called an institute of English law. If a man undertakes to rear a child not his own, the law will hold him to his undertaking; it will compel him while he keeps the child to make decent provision for his wants; this is the sum and substance of what we have on this head.

But if the *patria potestas* could be created, it could also be terminated, by an artificial process. This process, however, illustrates very strikingly the feeling of the Romans as to the *patria potestas*, showing how deeply founded they held it to be in the natural relation of father and son. The father could not by a simple act of his own will release the son from his control. For this purpose he must sell him out of his own hands into that state of *mancipium* or qualified slavery of which we have spoken. Even then the father's power was not destroyed: it was suspended during the existence of the *mancipium;* but if the *mancipium* ceased, if the son was set free by the person who held him in that condition, the father's right revived. If he sold him again into the same state, and he was

again set free from it, the father's right revived again. It was not until he had sold him three times over, that he used up his right of control beyond the possibility of a revival. This, then, was the form by which the son was liberated from the *patria potestas.* He was sold by the father to a friend, who at once manumitted him. He was then sold a second time, and a second time manumitted. But, when he was sold the third time, it was with a pledge that the buyer, instead of manumitting him, should sell him back to the father; and the father finished the ceremony by manumitting him, as he was now able to do, the *patria potestas* having been extinguished by the thrice-repeated sale. This process was called *emancipatio*, because it was *e mancipio*, from the formal condition of *mancipium*, that the son passed into his final condition of a man *sui juris.*

The changes here described—adoption, arrogation, emancipation—all involve a *deminutio capitis*, the *minima capitis deminutio.* This seems only natural in the case of arrogation, for there a person who before was his own master puts himself under the absolute control of another person. But it does not seem so clear in the case of adoption, where a man simply passes from the control of one person to the similar control of another. And as to emancipation, where a man escapes from the control of another and becomes his own master, we might expect that this would be re-

garded as an *amplificatio capitis* rather than a *deminutio.* It must be observed, however, that by adoption and by emancipation a man lost all rights which belonged to him as a member of his original family, especially his right of inheritance as a member of that family. And it was doubtless this loss of previously-existing rights that led the Roman jurists to regard every change of family as a *capitis deminutio.* It should seem, too, that emancipation was looked upon with some disfavor by the Romans, that it was not regarded as generally desirable, and was not generally practised. There was a stigma in the very form: the emancipated person must fall three times into the quasi-slavery of the *mancipium* before he could be free from the father's power.

In the next lecture we shall finish the law of family relations, discussing the *agnate family*, the *law of marriage*, and the *law of guardianship.*

LECTURE VI.

LAW OF FAMILY RELATIONS (CONTINUED).

THE AGNATE FAMILY consisted of such cognates (blood-relations) as could trace their lineage through males alone (father, grandfather, etc.) up to a common male ancestor, whose family-name they all bore, and to whose *patria potestas* they would have been subject had he lived to their time. But persons brought into a family by adoption became agnates; and those who passed out of it either by adoption or emancipation ceased to be agnates (though still cognates). By the earlier law intestate inheritance was confined to the agnate family. Gradually, however, cognates who were not agnates (emancipated persons, mothers under the freer marriage, etc.) were admitted to certain rights of inheritance. And finally in Novel 118, Justinian set up cognation, in place of agnation, as the basis of intestate inheritance. [Maine's opinion that agnation as a legal institute, wherever found (among Hindoos, early Germans, etc.), implies the former existence of a *patria potestas* like the Roman; and that both institutes belonged to the primitive or patriarchal constitution of society.]

MARRIAGE required no ceremony to make it valid; but in early Rome it usually began with *confarreatio*, a religious rite, or with *coëmptio*, a formal purchase of the wife (by a kind of *mancipatio*). These brought the wife *in manum viri*, so that she stood to her husband *in loco filiae*, with dependence in person and property much the same as by the old common law. If married without them, she did not come into the agnate family or under the control of her husband, until brought there by a *usus* of one year; but this *usus* might be defeated by an absence of three nights in the year from her husband's residence. In the time of Cicero the stricter marriage had ceased to be the prevailing one: in that of Gaius it could only be secured by *coëmptio*. In the Justinian law we find only the freer marriage: the wife remains an agnate of her old

family, and keeps her own property, with full right to increase it by acquisitions of her own.

This change was connected with a growing facility and frequency of divorce, which could be effected by the express will of either party: the party that made it without just cause might be punished, but the divorce was valid. The Christian Church, contending for the sanctity of marriage against this freedom of divorce—with little effect until after the barbarian conquest—found help in Germanic usages which merged the wife's personality in the husband's. Marriage with complete legal dependence of the wife was thus established by canon law, acting with Germanic, against the Roman. Latterly there has been an opposite movement, which is likely to go further, unless again discredited by undue freedom of divorce.

A *donation* between husband and wife was not valid, but became so, if not recalled, at the death of the giver; and it was always valid, if made by its own terms to take effect at the giver's death, or after a divorce mutually agreed on. But it was common, at marriage, for the wife (if she had property) or her family friends, to make a sort of donation, called *dos* (dowry), to the husband, which became his property, to be used in the support of the family, and restored when the marriage ended. And under the Christian emperors there sprung up a *donatio ante* (or *propter*) *nuptias*, set apart by the husband to become his wife's, if she survived him, as a help in maintaining their children.

GUARDIANSHIP (*tutela*) was required for a child left *sui juris*. The *tutor* might be a person designated by the law, or appointed by the father's will, or by a magistrate. The boy under seven full years was an *infans*, unable to speak or act for himself in any matter of law or business. From seven to fourteen, he was an *impubes qui fari potest*, and could perform many legal acts, but for any that might cause him disadvantage (as the incurring of a debt, or the release of a debtor) he must have the presence and *auctoritas* of the tutor. At fourteen completed, he ceased to have a tutor, and could do all things for himself. Yet while he was still a *minor* (under twenty-five), the prætor was ready by a *restitutio in integrum* to annul any disadvantageous obligation he might have incurred. But a *lex Plaetoria* (about 200 B. C.) allowed him to have a *curator;* whose approval (*consensus*) of any act removed this liability to future annulment. Difference between the offices of tutor and curator.

ANOTHER remarkable institute, connected with the *patria potestas*, and dependent upon it, is the agnate

family. Like the *patria potestas*, it was peculiar to the *jus civile* in its restricted sense, and belonged only to Roman citizens. The agnate family consisted of all persons, living at the same time, who would have been subject to the *patria potestas* of a common ancestor, if his life had been continued to their time. We have seen that a man's *patria potestas* comprehended not only his own children, but the children of his sons and the children of his sons' sons, if any such were born in his lifetime; but that it did not extend to the children of his daughter, these being members of another family, and subject to another *patria potestas*, exercised by the daughter's husband. And the same would obviously be true as to the children of any female descendant. If a man lived to an advanced age, his *patria potestas* would extend to all his descendants in the first generation, that is, to all his own children, but not generally to all those in the second or third generation: thus in the second generation it would extend only to those who were connected with him through males in the first; in the third, only to those who were connected with him through males in the first and second. All his descendants would be cognate to him and to each other: there would be a cognation, a natural kinship, a connection of blood between them; but only those who were either his own children, or connected with him through males, would be subject to his *patria potestas*, and therefore agnates of him and

of each other. So too, if the common ancestor had been dead for two hundred years: all his living descendants were cognates of each other, there was a natural relationship, a blood relationship, subsisting among them; but only those who were connected with this common ancestor through an unbroken series of male persons, would have been subject to his *patria potestas* if his life had continued to their time: only these, therefore, were agnates of each other. The distinction is so important, that you will excuse me if I dwell upon it a little longer, and endeavor to give some further illustration. Suppose that some person now living of the name of Winthrop, descended through father, grandfather, great-grandfather, etc., from old Governor Winthrop of Massachusetts, who died in 1649, should make out a complete genealogical table including all the descendants of that remote ancestor. He would give first all his children; then all his grandchildren, the children of his daughters as well as of his sons; then all his great-grandchildren, the children of granddaughters as well as of grandsons; and so for each generation, giving the descendants of females equally with those of males. The list would naturally include many persons of other names than Winthrop; and all these persons would be cognates of each other. But suppose, now, that he should make another and more restricted list, containing only those whose connection with the common ancestor could be traced

through males alone. He would first give all his children, as before, daughters as well as sons. He would give next the children of his sons; but would exclude the descendants of his daughters. He would then give the children of his sons' sons; but would exclude all descendants of his sons' daughters. And so on. Such a list would include only persons of the name of Winthrop. It would include females who had that as their native name, but would not include their descendants, born in other families and with different names. The persons in this second list would have what the Romans called an agnate relationship. But a Roman list of agnates was liable to be affected by two circumstances which have no existence in our days, by adoption and by emancipation. An emancipated son was not only discharged from the *patria potestas* of his father: he was cut off from the agnate family to which he had belonged. He was not even the agnate of his own children, if any had been born to him before his emancipation: they were not under his *patria potestas*, but under his father's. If he had one child born before and another born after his emancipation, the two children were under different *potestates*, and were not agnates to each other. So if a person was adopted from one family into another, he lost all the agnates whom he had as a member of the first family; but then, as an offset for this, the agnates of his new family became his as much as if he had been born in it. His

cognates, depending on natural relationship, could not be affected by his adoption; but in his agnates there was a total change. When, therefore, we speak of the agnate family as consisting of descendants from a common ancestor and connected with him by descent through males alone, we must add those who may have come in by adoption from another family, and we must subtract those who may have gone out either by adoption into another family or by emancipation.

The legal importance of the agnate family lay mainly in its relation to inheritance. By the early Roman law, cognates as such had no rights of inheritance whatever. If a man died without will, his property went to his *sui heredes* (own heirs, direct heirs), that is, to the persons who were previously under his *potestas*, but were released from it by his death. If he had adopted as son a person not connected with him by birth, that person was included among the *sui heredes;* on the other hand, a son by birth whom he had emancipated was not only excluded from the *sui heredes*, but could not in any case inherit from his father. If there were no *sui heredes*, the property went to the collateral agnates who stood nearest of kin to the deceased, his brothers or sisters, his brothers' children, his father's brothers or sisters, his father's brothers' children, etc. His mother's brother, his sister's child, and other such relatives, who were cognates but not agnates, could not inherit from him in any case; nor

could even his own brother inherit, if by emancipation he had been cut off from the agnate family. If there were no agnates to be found, in any degree of kinship, or if the nearest agnate refused the inheritance, his property, according to the Twelve Tables, went to the *gens*, or extended group of families, to which he belonged. With such rigor did the early law confine the rights of inheritance to agnates only. It was modified, to some extent, by the prætor's edict, and by statutes of the imperial time. Thus children were allowed to inherit from their mother, and a mother to inherit from her children, and children of the same mother but different fathers to inherit from one another, and so on. Still, even in the Justinian books, intestate inheritance depended to a great degree on agnate relationship. But in one of his novels Justinian took up this subject anew, and made a pretty complete revolution in it, discarding agnation almost wholly (except as to adopted persons) and putting cognation in its place as a ground of inheritance.

The *patria potestas* of the Romans appears to be without a parallel in the law-systems of other nations. But as to the agnate family, Mr. Maine, in his "Lectures on Ancient Law," says that "there are few indigenous bodies of law belonging to communities of Indo-European stock, which do not exhibit peculiarities in the most ancient part of their structure which are clearly referable to agnation. In Hindoo law for

example, which is saturated with the primitive notions of family dependency, kinship is entirely agnatic, and I am informed that in Hindoo genealogies the names of women are generally omitted altogether. The same view of relationship pervades so much of the law of the races who overran the Roman Empire, as appears to have really formed part of their primitive usage. . . The exclusion of females and their children from governmental functions, commonly attributed to the usage of the Salian Franks, has certainly an agnatic origin, being descended from the ancient German rule of succession to allodial property" (i. e., property not held of a feudal superior). "In agnation, too," he continues, "is to be sought the explanation of that extraordinary rule of English law, only recently repealed, which prohibited brothers of the half-blood from succeeding to one another's lands. In the Customs of Normandy, the rule applies to *uterine* brothers only, that is, brothers by the same mother but not by the same father; and limited in this way it is a strict deduction from the system of agnation, under which uterine brothers are no relation at all to one another. When it was transplanted to England, the English judges, who had no clew to its principle, interpreted it as a general prohibition against the succession of the half-blood, and extended it to *consanguineous* brothers, that is, to sons of the same father by different wives. In all the literature which enshrines the pre-

tended philosophy of law, there is nothing more curious than the pages of elaborate sophistry in which Blackstone attempts to explain and justify the exclusion of the half-blood." I may add that Mr. Maine, the eminent writer from whom I have quoted this passage, regards the institute of agnation, wherever found, as resting on a previously existing *patria potestas*. He concludes therefore, that the Hindoos, who have a fully developed system of agnate inheritance, must at some time or other have had an institute like the Roman *patria potestas*. Indeed, he considers the peculiarity of the Romans in respect to this institute as due simply to the fact that they have preserved what other nations have generally abandoned. This absolute and life-long power of the father was, he thinks, a general feature of primitive communities. Human society everywhere consisted originally of families, each directed and represented by a living head. It was, in fact, the patriarchal organization, in which the community was an aggregate, not of individuals, but of families, the family being the true social unit, and manifesting its unity in the undisputed supremacy of the patriarch or oldest living ancestor. In the early communities this organization seems to have been connected with a nomadic life, the life of wandering herdsmen, such as were Abraham, Isaac, Jacob, and his sons. With settled life, especially in towns or cities, with advancing civilization (which means literally

"making men citizen-like, making them like city-dwellers"), the patriarchal organization of the family was generally abandoned. Only in Rome, if the Roman *patria potestas* was really a genuine tradition from the old days of Indo-European nomadism, was it maintained with extraordinary tenacity through a long career of national growth, power, and culture, to the latest period of national existence.

Our next subject is the law of marriage, the legal relations of husband and wife. Among the Romans no special ceremony was required to establish the relation. It was enough that a man and woman, to whose union there was no legal impediment, from nearness of kin or from any other cause, lived together as husband and wife, giving themselves out as such: the law recognized the consent of the parties thus expressed as sufficient to constitute the legal obligations of matrimony. There were, however, ceremonies specially designed and used for this object. Thus, the *confarreatio*, a religious rite, solemnized in the presence of the Pontifex Maximus or the Flamen Dialis (priest of Jove) and ten witnesses: certain customary forms of words were uttered, and a cake of meal or flour was presented as an offering; from this the ceremony had its name, *confarreatio* from *farreus* (i. e. *farreus panis*, cake of meal or flour). Then there was the *coemptio* (joint purchase), with at least five citizens present as witnesses, and a sixth as *libripens*

or balance-holder, just as in the form of sale called *mancipatio.* The precise words and actions used in the *coemptio* are not known; but doubtless they bore a considerable resemblance to those used in the *mancipatio.* The *coemptio* was in form a purchase of the wife by the husband from the family to which she had belonged. The effect of both forms (*confarreatio* and *coemptio*) was that the woman came, according to the technical phrase of the lawyers, *in manum viri* (into the hand or power of the husband); and this they explain by saying that she stood to her husband *in loco filiae* (in place of a daughter): she was subject to much the same control in person and property as the daughter under the *patria potestas* of her father. If she had any property at the time of marriage, it became her husband's. Whatever she could acquire after marriage was acquired not for herself but for her husband. It does not appear, however, that the husband ever had over his wife the unrestricted *jus vitae et necis* which the father had over his child.

The position of the woman *in manu viri* was not widely different from that of married women under the English common law. Blackstone, in his chapter on "Husband and Wife," where he shows not only that "the very being or legal existence of the wife is suspended during marriage," but that she is liable *flagellis et fustibus acriter verberari* (with whips and sticks to be sharply chastised), winds up with these remark-

able words: *so great a favorite is the female sex of the laws of England.* A commentator illustrates this special favor for the female sex by showing that while a man who killed his wife could only be hanged for it, a woman who killed her husband had the gracious privilege of being disembowelled and burned alive! In regard, however, to the merging of the wife's legal personality in that of the husband, under the English and the early Roman law, I remarked in the last lecture that it had its origin in a profound conviction of the natural, normal unity between the married pair, a unity which the law must not compromise by giving any opportunity for a divided will or conflicting action; in all legal matters the two must act as one, and of that joint action the husband is naturally taken as the agent or executive. Whatever we may think of the wisdom or expediency of this course, whatever we may think even as to its practical equity, we must not fail to recognize and respect the feeling out of which it sprung.

I have said that this subjection to the husband's legal power was the immediate result of marriage in the two forms mentioned, *confarreatio* and *coemptio*. A marriage which commenced without these forms did not at the outset confer any such power on the husband. The wife entered her husband's household, but did not in a legal point of view become a member of his family. If she was under the power of a father,

she continued to be so still. She retained her connection with the agnate family of which she was before a member; and with it retained her former rights of inheritance. If she was *sui juris* and had property of her own, she did not lose her separate ownership and control of it, nor was she prevented from making further acquisitions for herself. Still the Romans held, in the early time of which we are now speaking, that the natural effect of marriage, if long enough continued, was to bring the woman into the family and into the hand (the power) of her husband. As in reference to lands, houses, etc., a possession long enough continued might cure a defective title, so it was in reference to marriage. The uninterrupted possession of a wife for one year gave the husband all the rights which he would have acquired at the outset if married with *confarreatio* or *coemptio.* The husband's power of control was then said to be acquired by *usus.* If, however, the wife wished to preserve her freedom from the control of her husband, she was allowed to interrupt the *usus* by absenting herself three nights in the year from her husband's residence. This privilege of defeating the *usus* and avoiding the husband's power by a three nights' absence in each year was granted in an express provision of the Twelve Tables. It was probably at first a device of the patricians to uphold their special interests: women of their order would occasionally marry plebeians, of whom, indeed, many were

not less wealthy or long-descended than the patricians; and by this contrivance the patrician wife could be prevented from becoming a plebeian like her husband, and her property, if she had any, could be kept out of his control, so as to come after her death into the hands of her patrician agnates. However this may be, it certainly became more and more common to contract this freer kind of marriage, and to guard it from passing by *usus* into the stricter kind. Before the close of the republic, the freer marriage had come to be the prevailing type. The *usus*, from being constantly evaded, went at length out of use. Cicero alludes to it as something still subsisting in his day; but Gaius, two centuries later, describes it as obsolete. The *confarreatio* in the time of Gaius had become rare, and no longer brought the wife *in manum viri*. The only way left to accomplish this effect—to place the wife under her husband's power—was by the *coemptio*. And this, too, disappeared before the time of Justinian, probably long before it. The Justinian books represent to us only the freer kind of marriage: the wife had her separate estate, exempt from the control of her husband, with the right of increasing it by her own acquisitions.

If we ask why the stricter marriage of earlier times was thus gradually, and in the end completely, supplanted by the freer, it must be admitted, I think, that the frequency of divorces and the ease of obtaining

them had much to do with the change. It did not seem equitable or endurable that the wife's estate should become the property of a husband who might at any time, or for any cause, or without any cause, put an end to the connection between them. The Roman principle was that the consent of the parties was required, not only for contracting marriage, but for maintaining it when contracted. Any act of either party by which this consent was explicitly withdrawn was sufficient to terminate the relation. The *confarreatio*, indeed, being a religious rite, a corresponding religious rite, called *diffarreatio*, was necessary to dissolve the obligation. But, with this exception, a marriage could be terminated without any specific form, without the coöperation of any public authority, by the simple announcement of either party that it was terminated. The party that put an end to a marriage without sufficient ground for doing so might be punished by law for his misconduct; but the divorce did not thereby lose its effect.

Here, then, we find two very conspicuous features of the Roman law, especially in later times—the legal independence of the wife, and the extreme freedom of divorce. If, now, we turn to mediæval Europe, we find in both respects an extraordinary difference, a difference which in the main continues even to the present day. How is this difference to be accounted for? By the joint operation of two factors, the Church and the

barbarians. To the legal independence of the wife, if it had stood by itself, unconnected with the facility and frequency of divorce, the Church might have had little objection. But in the prevailing system of divorce it was impossible that the Church should acquiesce without a protest. That system, in its extreme laxity, was opposed not more plainly to the teachings of the New Testament than to the interests of a sound morality. The legislation of the Christian emperors, from Constantine to Justinian, shows tendencies toward a reaction on this subject, tendencies which we may safely ascribe to the influence of Christianity. Still the old system was so deeply rooted in the imperial traditions, and so strongly favored by the corruption of the imperial court, that imperial legislation was not likely to be wielded very effectively against it. But in the wreck of the Western Empire, when the political forces of the state were shattered, the Church, preserving her organism through the shock, obtained a more independent position and a more commanding influence. She was then able to give effect to the teachings of Christianity and pure morality on the subject of divorce. She could do this the more readily, as the fiery trials of that fearful period developed a new spirit of asceticism, of rigorous self-denial, and abstinence from earthly pleasure. To attain her object, she would naturally lay hold of every element which seemed to favor the indissoluble unity and sanc-

tity of the marriage relation. And here she found help in the ideas and usages of the barbarians. Not that the barbarians had any special tendencies toward purity of life, or any objection to divorce, as a means, along with polygamy and concubinage, for the gratification of lawless desires. On this point the Church had to contend long and suffer much before she could bring her new subjects into any tolerable order. But as to the rights of married women, the law-customs of the barbarians were much like those which prevailed in Rome herself during the earliest and least civilized part of her history. The married woman was scarcely allowed to have any separate legal activity, her legal personality being absorbed and lost in that of her husband. This principle the Church adopted from the barbarians and incorporated into its canon law, because it seemed to harmonize with and give support to that indissoluble unity of married life which the Church was interested in maintaining. In general, the canon law was founded on the Roman: here, however, we find an exception, and a remarkable though by no means an inexplicable one. The Roman law, where it was opposed to Germanic customs, had in most cases the countenance of the Church; but here, in regard to the legal independence of married women, it had to contend single-handed against the united forces of Germanic custom and ecclesiastical law. It was almost everywhere unsuccessful in the contest.

Of late, however, a reactionary movement has appeared. The tendency of legislation in France, in England, and in our own country, is more and more to give married women the power of acquiring, holding, and managing property of their own. That this movement will be carried still further can hardly be doubted, even by those who oppose and deplore it. In my view, the great danger is, that it may be accompanied, as in ancient times, by a facility of divorce that threatens the sacredness of marriage and the permanence of family relations; and that it may in consequence be exposed, as it then was, to an odium and opposition which it did not deserve on its own account.

There are one or two points which require to be noticed in order to complete our view of marriage law. The Romans did not allow donations between husband and wife. If the wife made a donation to the husband, or the husband to the wife, the gift was not regarded as valid, and the giver could recall it at pleasure. There was danger that if gifts were allowed, they might be extorted by violence and menace, or gained by craft and deception. The less generous or the less scrupulous party would be sure to have the advantage. And besides, such was the freedom of divorce, that the person who made a large grant of property to-day, might be driven from the house to-morrow. But if a gift was made by either party to the other, and the giver died without having actually recalled it,

the law regarded it as valid. So, too, if the gift by its own terms was not to take effect until after the death of the giver; or not to take effect until after a divorce agreed upon by both parties. In all these cases the gift is recognized as an accomplished fact, not during the marriage, not while the parties are husband and wife, but after death or divorce has put an end to the relation. It was customary, however, at the commencement of married life, for the woman (if she had property), or her father, or other family friends, to make a kind of donation to the husband. This donation was called *dos* (dowry), and was a contribution on the woman's part toward the expenses of the new family. It became the property of the husband, to be used by him for the maintenance of the family, but with this condition that his right of ownership was to continue only during the marriage. When the marriage ended, whether by death or by divorce, the dowry must be restored. If it ended by the death of the husband, his heirs must restore it; if by the death of the wife, her family friends must receive back what they gave. If the divorce was occasioned by the fault of the wife, she was punished by a partial forfeiture of the dowry. Another donation, similar in nature to the dowry, and similarly permitted and encouraged by the law, was called *donatio ante nuptias* or *donatio propter nuptias*, according as it was made before or after the wedding. It seems to have sprung up as a customary thing in the

time of the Christian emperors. It was substantially a provision made by the husband to enable the wife, in case she survived him, to support the children who might be left upon her hands. Though it was thus set apart for the wife's future use, the husband in the mean time had the right to use and enjoy it; and if the wife died before him, or if there was a divorce without fault on his part, the donation was extinguished.

There remains one more relation of family law—that of guardian and ward. How did the Roman law provide for persons who were deprived of a father's care while too young to act for themselves, or to act with due intelligence and safety. Take the case of a son left fatherless in the first year of his life. If the father when he died was *sui juris*, the child, young as he was, became *sui juris* also; for he was no longer subject to a *patria potestas*. It was necessary that he should be placed at once under the charge of a guardian. If in the father's will a person had been named to act in this capacity, the guardianship was put into his hands. If there was no will, or if the will contained no appointment, the guardianship was given by the early law to the nearest agnate. If no agnate could be found suitable for the trust, it was the duty of some magistrate to appoint the guardian.

For the first few years, until he reached the age of seven, the child was incapable of any legal action. All that needed to be done in managing his estate was

done by the sole act of the guardian. Persons under seven were designated in law by the name of *infantes*, or by the fuller phrase *qui fari non possunt.* This, of course, does not imply that Roman children were so backward as not to begin talking before that age. The meaning was, that children so young could not speak the language of law and business; they could not pronounce, with the necessary comprehension of their meaning, the forms of expression used in legal transactions. Why was the age of seven fixed upon as the limit of this period of total incapacity? In fixing on fourteen as the age of puberty, the law-makers probably conformed to a prevailing fact of physical development as seen in the warm countries of Southern Europe. And as the objects of the law required that a division should be made in this period of fourteen years preceding puberty, the seven was chosen as making an equal division. Perhaps both denominations, the seven for infancy ended, and the fourteen for puberty attained, may have been made under the influence of that famous theory of ancient physicists, which regarded human life as a series of seven-year periods, each having its distinct characteristics. Our own twenty-one years, as the age of legal majority, was probably assigned under a similar influence.

During the second seven years of life, from the end of the seventh to the end of the fourteenth, children were called *impuberes qui fari possunt.* On entering

this period the boy came into a new relation to his guardian. He was now able to use for himself the words and forms required in the ordinary transaction of business. He was supposed now to have that tolerable understanding of their sense, without which his use of them would be a farce, a mere mockery of the law. But he was not supposed to have such knowledge and judgment that his use of them without the guidance of an older head would be at all safe for himself. Hence this principle was adopted, that, in cases involving any danger to the child, any possible disadvantage to his interests, his words alone were not valid. To make them valid, it was necessary to have also the presence and authority of the guardian. This authority (*auctoritas*, authorization) might be given in any form. If the guardian was present and heard the words of the child without opposition or protest, he was considered as giving his *auctoritas* or sanction. But his presence and his expressed or implied approval were necessary to give validity to the words of the child—if, as before said, the transaction was one that might be at all detrimental to the latter. Thus, the child acting without his guardian could take a receipt discharging him from a debt; he could impose an obligation, that is, could lay another person under obligation to him; he could accept a promise so as to make it binding on the promiser. But he could not bind himself; he could not lay himself under obliga-

tion to another; he could not pay out money; he could not alienate any of his property—without the concurrence of his guardian. He could receive money in payment of a debt, but he could not give a valid receipt, because his claim on the debtor was a part of his property, which would be alienated if discharged by a receipt. He could not accept an inheritance, because the heir was laid under obligation to pay the debts of the estate which he inherited. In general, if he acted by himself in any business which could subject him to possible loss or damage, his action was wholly invalid.

But with the age of fourteen, that is, with the completion of the fourteenth year, there came a mighty change. He was no longer subject to a guardian. He was at liberty to marry, and was a *paterfamilias* whether he married or not. He had entire control of his own property, and could alienate it by sale or gift at his sole pleasure. He could make a valid will, appointing an heir to his estate. It is curious to compare this extreme freedom of action conferred on the boy of fourteen whose father was dead, with the extreme disabilities imposed on the mature man of forty whose father was living. And it is certain that such freedom would not have been allowed at such an age, if the number to be affected by it had been very large. The great majority of boys at the age of fourteen were under the *patria potestas* of a father or grandfather. Of those who were not so, it is safe to say—as wealth

is everywhere an exceptional thing—that the great majority were poor, without any estate to be wasted by their indiscretion. It was only here and there one who was liable to be ruined for want of the guardianship which was withdrawn before he was old enough to do without it. But, as the Romans increased in wealth, there was an increasing number of persons exposed to this danger. At length, the prætors thought it necessary to interpose for their relief. If any person between the ages of fourteen and twenty-five had suffered actual disadvantage from some business transaction, the prætor on application would set aside the transaction. By a *restitutio in integrum* (as the process was named—a restoration to the former state), he put the parties back into the same relations as they had prior to the transaction. If the Romans appeared to us before as having much more confidence than we in juvenile discretion, they now show decidedly less than we do. They fix a term four years later than ours for full majority, assuming that until that time (until the completion of his twenty-fifth year) the young man needs to be protected by law from the consequences of his unripe judgment. But this interference of the prætor in behalf of the minor (the person under twenty-five), to annul the disadvantageous transactions in which he had engaged, was not without its inconvenience for the minor himself. It made people shy of dealing with him, for they could not be sure

that their dealings would not be set aside. To remove this difficulty, it was provided by an early statute (the *Lex Plaetoria*, passed about 200 B. C.) that any youth who had completed his fourteenth but not his twenty-fifth year might have a curator; and that the consent of the curator given to any act of the minor should secure it from this danger of subsequent reversal. This curatorship of minors, of youths under twenty-five, though somewhat resembling the guardianship before described of children under fourteen, was yet clearly distinguished from it. The child *must* have a guardian: the minor *might*, if he chose, have a curator. The action of a child without his guardian was usually invalid from the outset: the action of the minor without his curator was in itself always perfectly valid, though liable to be invalidated at some future time. When the child acted, the guardian must be present and give his *auctoritas* or authoritative sanction, on the spot. When the minor acted, the curator's presence was not required: his *consensus* or approval of the act, whenever or wherever given, was sufficient for all purposes.

We have now considered all the relations of family law, and shall proceed at our next meeting to take up the *law of property*.

LECTURE VII.

LAW OF PROPERTY.

PROPERTY was divided by Roman jurists in various ways; thus into —1. *Res divini juris* (for pious uses), including (*a*) *res sacrae* (for the service of the gods), and (*b*) *res religiosae* (for the burial of the dead); 2. *Res humani juris* (for secular uses), divided again into (*a*) *res privatae* (belonging to individuals and subject to traffic), and (*b*) *res publicae*, including *res fisci* or *aerarii* (pertaining to the treasury of a state or city), *res sanctae* (as city walls and gates, analogous to things *divini juris*), and *res communes omnium* (the air, the running river, the sea, the shore below high-water mark, etc.).

Another division was into *res corporales* and *incorporales*. To the latter, apprehensible not by the senses but the mind only, belong rights and claims. So also do the shares (ideal parts) of A and B in any undivided property common to both. In the total estate of a living person and the *hereditas* of a deceased one, the parts might be all corporeal, but the whole was incorporeal. So, even in a flock of sheep, if permanently kept up.

A third division was into *res mobiles* and *immobiles*. To the latter belong land and buildings (*solum* and *res soli*). In the Roman system, this division was less important than (owing to feudal relations) it has been in the modern civil law, and very much less than in the English, where it still severs the whole private law into two great sections.

Property rights (*dominium*, ownership) might originate—1. By *occupatio*, a taking possession of what never had an owner, or has ceased to have one; thus things abandoned by the owner; things of an alien enemy at breaking out of war (all previous rights destroyed, or at least suspended, by capture in war); undomesticated animals, while in a state of freedom; discovered treasures, of unascertainable ownership; new

land formed by alluvial action; 2. By *specificatio*, where one makes from property of another some different species of product (not restorable to the former condition); 3. By *mixture*, where one unites another's property with his own in an inseparable union (as two kinds of wine; not so, two heaps of grain). But if one thing becomes a mere *accession* (subordinate) to the other, the new whole belongs to the owner of the principal thing: the written letters were an accession to the parchment, but not so the painting to the canvas. The building (if designed to be permanent) was always an accession to the soil.

Property rights (not derived from a previous owner) might also arise by *usucapio*, undisputed possession for a certain time. For this, the possessor must have *bona fides*, real belief that he is owner, founded on a *justa causa possessionis*, as sale, gift, inheritance, etc., which usually gives full legal title. In the case of property which had been stolen, even these were insufficient. By usucapion, the *bonorum possessor*, who had bought *res mancipi* without the form of mancipation, or who was allowed by the prætor to inherit under an informal testament (*see* Lecture IV.), became *dominus* (owner); but these uses ceased under Justinian. The time for usucapion, one year for movable things and two for immovable, was extended by Justinian to three years for movable and ten years (or against claimants in another province, twenty) for immovable. There must be actual possession for so long a time; and possession was held to be suspended while an adverse claim was under trial.

Possession without *bona fides* and *justa causa* could never give title against an actual owner, but was maintainable by law against any person whose right was no better than the possessor's. For such purposes, the Roman jurists, analyzing possession, distinguished in it a *corpus* (actual control over the object), and an *animus* (disposition to treat it as one's own). Remarkable development of this institute explainable from—1. The frequency of the *precarium*, where a debtor, who had given up some property as security for his debt, was allowed to have possession of it at the creditor's pleasure; 2. The necessity, in every trial of disputed ownership, to determine who should have possession until the case was decided; 3. The immense tracts of public domain land, held in possession by individuals, but remaining still in the ownership of the state.

THE Roman jurists were accustomed to classify property in several ways, according to various differences in its nature and relations. Thus they distin-

guished *res divini juris* (things consecrated to pious uses) from *res humani juris* (things used for secular purposes and wants). The former, the *res divini juris* were withdrawn from human traffic. They included *res sacrae* (sacred things), consecrated to the service of the gods, as temples, altars, and the like; and *res religiosae* (religious things), consecrated to the interment of the dead. If a man selected a spot, on ground belonging to himself, for a place of burial, and actually used it as such, the spot so used became a *locus religiosus*. The will of the individual was here sufficient to give the character of *res divini juris* to the ground selected and to any tomb or other structure built upon it. The *res sacrae*, on the other hand, derived their character from the authority of the people. Any *res divini juris* (whether *sacra* or *religiosa*) could only cease to be such by public authority. If, however, it was taken by an enemy in war, the effect was the same: the legal status of an object, the rights appertaining to it, including even the *jus divinum*, were always obliterated by such capture. The *res humani juris* are also divided into two classes, *res privatae* and *publicae*, according as they do or do not belong to private persons. The *res privatae* are subject to traffic, to be sold for money, bartered for other articles, pledged for debts, bestowed as free gifts, and disposed of in other ways. Even the *res publicae* are not altogether excluded from traffic. The public treasury of a

city or country enters into all business relations, buying, selling, exchanging, etc., like the estate of an individual. The public treasury had, indeed, by Roman laws certain advantages in its business operations, in acquiring, maintaining, and enforcing its property rights; but in their nature these operations were not essentially different from those of private persons. But there are things of public use which could not thus be dealt in. Some were even placed under religious sanctions, and were regarded as analogous in character to the *res divini juris.* Such things were called *res sanctae.* Whoever injured them was subject to the guilt and penalty of sacrilege. The walls and gates of a city are mentioned as examples of this class. Placed with religious ceremonies under the special care of tutelary deities, they were not indeed appropriated to divine service, and were therefore not *divini juris*, and yet they had a peculiar and inviolable sanctity. Other things again could not be dealt in, because they were *communia omnium*, the common property of all men, not subject to the special control of individuals or communities. So the air, the running river, the sea and with it the sea-shore, as far in as the water reaches at high tide—over these things nobody can exert an exclusive power. One may indeed isolate certain portions of them, so as to acquire a separate ownership. One may use the water of a river to supply a pond in his own grounds, and thus

become owner of so much of it as he appropriates in this way. But he cannot own the stream as a whole, nor even any section of a mile or a rod in length, so as to prevent others from using it for washing, swimming, boating, and the like. One may construct an enclosure of some kind by the sea, lower down than high-water mark, or even than low-water mark. He thus becomes owner of the ground within the limits of this enclosure, because he is able to exercise an exclusive control over it; but if the water sweeps away his enclosure, his exclusive control is lost, and with it all his rights of ownership. This, then, is the first division of things—into *res divini juris* on the one hand, including *res sacrae* and *res religiosae;* and, on the other hand, *res humani juris*, including *res privatae* and *publicae*, while among the *publicae* we distinguish especially the *res fisci* or *aerarii* (belonging to the treasury), the *res sanctae*, and the *res communes omnium.*

Another division is into *res corporales* and *incorporales* (corporeal and incorporeal things). The former are apprehensible by the senses, the latter by the mind only. Of the former kind are lands, buildings, cattle, gold, silver, etc.: it is unnecessary to multiply instances. Of the latter kind are rights and claims. If I have a right of way over my neighbor's land, this right is a piece of property, it has a money value; but it is not a thing that can be touched or felt, it is a *res*

incorporalis. So if I have a claim against my neighbor for a hundred pounds, if he is bound to pay me that sum, the obligation has a substantive value, depending on the means and character of the debtor; but it is not a palpable, tangible thing: it is a *res incorporalis.* The money, when it is paid (if it is money, if it is specie), will be a corporeal thing; but the obligation to pay is incorporeal. If the payment is not in money, but in a bank-bill or a treasury greenback, it will be only the substitution of one incorporeal thing for another: instead of the obligation of my neighbor, I shall have the obligation of the bank or of the government, the value of which will depend on the means and character of the banking company or of the governing people: the new obligation may be worth as much as the money, that is, the amount of gold or silver named in it, and it may not be worth a half, or a tenth, or a ten-thousandth of that amount. In these cases the ideal, incorporeal character of the property is plain. In others it may require some reflection to recognize it. Thus if two men, A and B, hold a piece of ground, say a ten-acre lot, in common, as joint owners of the undivided land, the whole lot is a corporeal thing; but A's part and B's part, according to the theory of the jurists, are incorporeal. Each of them, it is evident, owns the half, not the whole, of the ten acres. But if you attempt to point out each one's half, so that it can be seen or touched, you will find yourself

baffled. There is no visible part, no square foot or square inch of surface that does not belong to A as much as to B, and to B as much as to A. The parts, in fact, have as yet no separate existence; they are not cognizable by the senses, they are ideal, incorporeal. The Romans had a process of law, the *actio communi dividundo* (the action for dividing property held in common), by which either of the joint owners might cause his part to be set off with definite boundaries. When this was done, the parts became corporeal things; but then there was no longer a joint ownership; each man became separate and sole owner of the part assigned to him. In the case just supposed, the parts were incorporeal while the whole was corporeal. But the opposite case is frequent, where the parts are corporeal but the whole incorporeal. You will probably think me paradoxical if I give as example a flock of sheep. For this seems at first view to differ only in number from the single objects that compose it, and to be like them corporeal. And this view would be a correct one, if the flock was only a collection, brought together by accident, and having no permanent character. But it is otherwise with a flock which is kept up for a length of time, so as to have a continued existence, an identity, independent of the particular individuals belonging to it, and remaining the same while these undergo a complete change. A whole which remains the same while the material parts that

compose it are all changed, cannot be entirely material; it must have an ideal element which continues through all changes and maintains the identity of the whole. This reasoning may seem rather subtile, but the correctness of the conclusion is generally admitted. So a man's estate, the total of his property relations, the aggregate of money, lands, chattels, rights, claims, and liabilities, belonging to him, was regarded by the Romans as a *res incorporalis*. Even if it happened to consist only of material things, money, lands, chattels, without any immaterial rights, claims, or liabilities, this was a mere accident, and the estate, as such, was still regarded as a *res incorporalis*. And so was the *hereditas*, the estate of a deceased person, the total of his property relations, which, by will of the deceased, or by course of law, became vested in the person of his heir.

A third division of property is into *res mobiles* and *immobiles* (movable and immovable property). Immovable, in the fullest sense, is land alone; but buildings or structures of a permanent character erected upon it, share in this quality. The *solum* and *res soli* constitute the class of *res immobiles*. They are in their nature so peculiar that no law-system can fail to recognize the peculiarity. A popular writer says: "No man, be he ever so feloniously disposed, can run away with an acre of land. The owner may be ejected, but the land remains where it was; and he who

has been wrongfully turned out of possession may be reinstated into the identical portion of land from which he had been removed. Not so with movable property; the thief may be discovered and punished; but if he has made away with the goods, no power on earth can restore them to the owner. All he can hope to obtain is a compensation in money, or in some other article of equal value." In the Roman law, however, this distinction between land with its fixed appurtenances and all other kinds of property was not made very prominent. So far as its nature admitted, land was put on the same footing and treated in the same way with movable property. In English law, on the other hand, this distinction is of overshadowing importance. Landed property is peculiar in the modes of creating and transferring it, in the processes for defending and reclaiming it, and indeed in the most of its incidents and relations. It is true that there has been a progressive assimilation: the differences are not so great now as they were in former centuries; but they are still so great as to demand separate treatment in the English books of law. These books all divide property law into two great departments, the law of real property and the law of personal property. They do not, like the Roman writers, give a body of principles and rules applicable to all kinds of property, and point out in connection with this the peculiarities which distinguish land and buildings. They give a

complete law of real property, and a complete law of personal property, as if they were two radically distinct systems. The fact here stated finds its explanation in the feudal system, as having land for its basis and regulator. The feudal nobility was not merely a landed aristocracy, a body of large land-owners; but their relations to one another, to the common sovereign above them, and to the popular mass below them, were determined by the land. Each member of the body had his rank, his privileges, his rights, his duties, affixed to and dependent upon the land which he held as liegeman of a feudal superior, or granted as liege-lord to feudal inferiors. Hence grants of land and tenures of land assumed a great variety of forms, conditions, and incidents. They were the main subjects of the early English law, in which, as already remarked, personal property, movable property, passed almost unnoticed. Personal property has since attained an importance not inferior to real; and the latter has lost many of the peculiarities which once belonged to it; but the separation between them is still much wider in English than in Roman law. Even the countries of the European Continent which have more or less fully adopted the Roman law, have been subject to the influence of feudalism, and their law-systems are in this respect less simple than the Roman.

We have next to consider the ways in which property rights are created, the modes of acquiring prop-

erty. Of course, the most frequent way is that of transfer by sale or gift from some previous owner. The right of the new owner is in such cases founded upon and derived from that of his predecessor; it is essentially the same right, only transferred to a new person. But it is not this derived ownership that we are to consider now. It is, rather, the origination of property rights which do not depend on a predecessor, the modes of original acquisition.

First, then, if a thing is without owner, any one is at liberty to take and keep it: he makes it his own by the very act of taking possession. To this mode of acquisition the Romans gave the name of *occupatio*, which indeed signified "taking possession." A thing might be without owner, because somebody who before owned it had voluntarily relinquished or abandoned it, had thrown it away or had given up exercising the rights of an owner. The person taking possession must be able to show by some such act or fact that the previous owner really intended to divest himself of his ownership. Again, in case of war, if, at the commencement of hostilities any Roman citizen had in his hands property belonging to a member of the hostile nation, he was entitled to keep it as his own. In an alien enemy the law recognized no right of ownership. Whatever right he before had was extinguished by the breaking out of war. The property which before belonged to him was left without owner,

and could therefore be acquired by any one who had possession of it. But things taken from the enemy during the prosecution of a war were differently treated: they became the property, not of individual captors, but of the state, which might indeed distribute them among the captors, but might and often did, dispose of them in other ways. The theory that preëxisting rights were destroyed by capture in war, was applied even to the property of Romans. If the flock of a Roman citizen was driven off, or the furniture of his house carried away, by the enemy, he lost not only his possession, but even his right of ownership, so that if the things taken were afterward recaptured from the enemy, he could not reclaim them as his own. This rule, however, which seems a harsh one, had some important exceptions: if lands or slaves or horses were captured, the owner's right was not destroyed by the capture, but only suspended during its continuance: it revived when the things were recovered from the enemy's power. Again, undomesticated animals, as long as they have their natural freedom, are considered as without an owner. If the caged bird escapes from its confinement, the owner's right ceases, until he can catch and confine it again. If anybody else catches it while free, he is entitled to keep it as his own: the previous owner cannot take it from him. The man who can catch a hare, may keep it and cook it if he will. And this, even if he caught it in his

neighbor's woods, where he had no right to go. In that case he was liable to punishment for his poaching, but was not required to restore his game. Yet, again, treasures or valuables which had been concealed so long that none could tell to whom they belonged, were considered as being without owner. If a man found such treasures on his own ground, whether accidentally or by searching for them, he was entitled to make them his own. He was not, however, allowed to search for them on his neighbor's ground; that would have involved too gross a violation of his neighbor's rights. If he explored the grounds of another for this purpose, he could not lay claim to any thing that he found. But if he was in anybody's ground for other purposes, and chanced while there to come upon such a hidden treasure, he could keep half of it for himself, the other half going to the owner of the ground. At least, these were the rules generally followed; for under the emperors there were repeated attempts to bring such findings into the public treasury. But this always proved to be impracticable: the effect was that men concealed their discoveries; and the government had to return to the old principle. Once more, if new land was formed by alluvial action, by soil carried down a stream and deposited on its banks or at its mouth, this new land became the property of him whose land it joined. If a new island was formed in the middle of a river, it belonged to the owners of the

banks between which it lay, their portions being determined by a line drawn in the direction of the stream midway between the banks. If a river changed its course, its former channel, now converted to dry land, was divided on the same principle between the opposite owners of the old river-banks.

In the cases thus far considered, the right of property was acquired in something which was previously without owner. But there were cases in which a thing that had an owner passed without his consent into the ownership of another person. Thus, where a man working on material that belonged to some one else made a new thing out of it, the new thing became the property of the maker, who in this way acquired ownership of the material. This was called *specification*, the making of a new species or kind of product: thus, where a man made cloth from another man's wool, or bread from another man's grain. It seems that on this point there was a difference of opinion between the two great schools of jurists. The Sabinians maintained that the owner of the material was entitled to the product: *quod ex re nostra fit nostrum est.* The Proculians maintained that the product belonged to the fabricator; and this view was adopted in the Justinian system. Perhaps a desire to favor productive industry may have had something to do with the preference. It was probably defended by arguing that the material in its old form had ceased to exist, that

the product was a new thing which had no previous owner, and therefore belonged naturally to him who made it with intent to have it as his own. For this effect it was necessary that the product should be essentially a new thing. If a man took a piece of white cloth belonging to another, and merely dyed it red or black, the change was not sufficient to maintain a claim of ownership. Even if a man took a mass of silver belonging to another and made a cup of it, he did not become owner of the cup: the change was not sufficient; a few blows of the hammer would reduce the cup to its former condition of a shapeless mass of metal. The principle was expressly recognized, that if the product could be reconverted to the old form of the material, there was no change of ownership. It ought, perhaps, to be added that the use of material belonging to another did not necessarily imply dishonesty in the person using it. It might be the result of a mistake; or, if there was fault, it might be the fault of some one else. Thus, the maker of the new thing might have purchased the material in good faith from some one who had obtained it through violence or fraud. And the owner of the material, though unable to recover the identical substance taken from him, was not left without remedy. He could bring an action against the person, whoever he was, that took away his property, whether the user of the material, or some one from whom he got it, and could thus ob-

tain compensation in money for the loss which he had suffered.

A similar transfer of ownership was sometimes occasioned by a union or mixture of things which belonged to two different persons. In order to this effect, it was necessary that the things should be brought into a very close and intimate connection. And here, again, the test-question was, whether it was possible to restore the former condition, to separate the things which had become united, so that they should be as they were before the union. If a carnelian seal belonging to Aulus was set without his consent in a gold ring belonging to Titius, Aulus was still in law owner of the seal, and Titius owner of the ring. If pieces of metal belonging to Aulus and to Titius were soldered together, each one remained owner of his own piece: the solder could be softened by heat and the pieces detached from each other. If two flocks of sheep, the property of different owners, became mixed together, there was no change of ownership: each man could pick out his own sheep, and have them separate as before. It might, perhaps, be difficult for him to recognize them, but this made no difference as to his right. And the same was true, even if two measures of wheat were mixed together: to separate the grains was not in itself impossible; and here again the fact that each man would find it difficult or impracticable to recognize his own made no difference as to his right. But

if two kinds of wine were mixed together, the case was different: the union here was indissoluble; to separate the two so as to restore the former condition was an absolute physical impossibility. If Titius mixed his own wine with that of Aulus, he became exclusive owner of the whole; while Aulus had his remedy in a suit to recover, not the identical thing which he had lost, but a compensation or equivalent in money. This was especially true, if along with the mixture there was a specification or creation of a new species of thing, distinct from either of the two that were united: as, when Titius made bread from his own flour mixed with that of Aulus, or cloth from his own wool mixed with that of Aulus, Titius was sole owner of the bread and of the cloth. It often happened, however, that of the two things united, one was a mere *accession* to the other, a mere secondary or subordinate part; and here a different principle prevailed. No matter which party made the union, the previous owner of the principal thing became owner of the new whole, while the owner of the accession lost his right of property, and could only claim a compensation for his loss. Thus, if Titius took a piece of cloth belonging to Aulus, and embroidered it with purple of his own, he not only gained no right to the cloth, but even lost his right to the thread. The embroidery was a mere accession to the cloth, and Aulus, who before owned it without the embroidery, owned it now *with*

the embroidery. Similarly, if Titius took a piece of parchment belonging to Aulus, and wrote a book or part of one upon it, the manuscript belonged to Aulus, not to Titius; the parchment could exist without the letters, but not the letters without the parchment. The parchment was regarded therefore as principal, and the letters as accessory. To us moderns this seems a perverse decision: we think of the literary contents of the manuscript as the important thing, and the writing-materials as comparatively insignificant. To reverse this relation appears to us hardly less unreasonable than the judge's decision in Cowper's poem that spectacles belonged to Nose, not Eyes, and "that when the said Nose put his spectacles on, by daylight or candle-light, Eyes should be shut." It must be remembered, however, that in ancient times writing-materials were relatively much dearer, and labor in copying much cheaper, than now. And, in fact, when it came to painting, the ancients themselves shrunk from the conclusion to which consistency would have brought them. It appears that some jurists (as Paulus) were disposed to treat painting like writing, to hold that the canvas was the principal thing, and the lines and colors laid upon it merely accessory. But here the disproportion of value was so great as to make the conclusion appear unnatural and arbitrary. The prevailing opinion was, that if a painter used a piece of canvas which was not his own, the picture belonged to

the painter, not to the previous owner of the canvas. The most important case of accession was that in which a man erected a building on another man's ground. It might be that the builder acted in good faith, believing the ground to be his own. He may have had a title which seemed to him perfect, until a judicial investigation proved it defective. Still he could have no right of property in a building thus erected. The soil was the principal thing, the building only an accession, a *res soli*. The owner of the soil was therefore owner of the building also. But for this effect the structure must be of a fixed or permanent kind. If it was a tent, which is a movable thing, or a booth designed to be only temporary, it had not that intimate connection with the soil which could alone effect a transfer of ownership. Even in case of a permanent building, if from any cause it came to be ruined or demolished, its materials (the stones or timbers of which it was composed) ceased to have any close connection with the soil: they were no longer *res soli*, and might be reclaimed by the original owner.

There is still one mode of acquisition left to be considered, the one called *usucapio* (taking by use), in which, by the possession and use of an object for a legally determined length of time, a person became owner of that object. It ought to be stated here, that possession, as a law-term, both in Latin and English, is always distinguished from ownership. Possession sig-

nifies an actual control over some object, without implying whether the control is or is not a rightful one. Ownership implies a right to exercise control, without deciding whether that right actually is or can be exercised. The man whose horse is stolen retains his ownership, but loses his possession: the thief obtains possession, but does not obtain ownership. Now, to acquire ownership by usucapion, something more than mere possession for a certain length of time was necessary. There must be *bona fides* on the part of the possessor: he must be acting in good faith, in the belief that he was really entitled to the object possessed; and this belief must be founded on a *justa causa possessionis* (a legal ground of possession), that is, on some transaction known to the law—such as sale, gift, inheritance, and the like—by which property rights are usually established. Without *bona fides* and *justa causa*, there could be no usucapion; if a man had not acquired his possession by some such legal transaction, or if, having acquired it in that way, he nevertheless knew that he had no sound title, he could not receive the benefit of usucapion. This institute was designed to help the cause of justice, not to be the means of defeating it. The leading object was to relieve a man from the inconvenience and difficulty of tracing the title of every piece of property that came into his hands. If he obtained it in some regular way, and held it in good faith for a certain length of time, noth-

ing more was necessary: he could maintain it against any claimant; he was not obliged to trace it back from one previous holder to another, and prove that each in succession was entitled to hold and to transfer it. It was possible, indeed, that a real owner might in this way be deprived of his property. But the theory of the law was, that the period of time required for usucapion was all that a real owner needed for the prosecution of his claims; that if he allowed this time to pass without the assertion of his rights, he could not justly complain if the power of asserting them was taken from him. In case of theft, indeed, the owner might be unable to find the object taken, and therefore unable to claim it, within the time allowed for usucapion. But this case was met by special laws, which exempted things taken by theft or robbery from the operation of usucapion. Not only was the thief or robber incapable of acquiring them, but even persons who received them in good faith, not knowing that they had been wrongfully taken from a previous owner. One object of usucapion, especially in the earlier time, was to supply a remedy for mere formal defects in the possessor's title, where its substantial justice was unquestioned. We saw, in a former lecture, that there were certain things, called *res mancipi* (lands, houses, slaves, horses, and cattle), the ownership of which could only be transferred by the ceremony of mancipation: without this ceremony, one might have them as possessor *in*

bonis (among his effects), he could not own them *ex jure Quiritium;* but after a possession of one or two years he became owner by usucapion. So, if a man received the estate of a deceased person under a will which had not been executed with all the prescribed formalities, he did not become owner of the estate *ex jure Quiritium*, as if he had been heir; he only had it *in bonis* as *bonorum possessor;* but here, again, after a possession of one or two years, he became owner by usucapion. Justinian, however, abolished the distinction between *res mancipi* and *res nec mancipi*, as well as the distinction between *hereditas* (inheritance, strictly so called) and the *bonorum possessio* (mere possession of a deceased person's estate), so that the institute of usucapion lost a large part of the uses which had formerly been served by it. Justinian, at the same time, extended the period required for usucapion. This under the old law had been surprisingly short, one year for movable things, two years for immovable: a rule which might be well enough adapted to the conditions of a petty state, where a man could easily keep track of his property, and defend it promptly if invaded by others, but must often have caused inconvenience in a great empire. According to the new rule set up by Justinian, three years were required for movable things and ten or twenty years for immovable: ten years' possession was an effectual barrier against claimants living in the same province as the

possessor, twenty years against claimants living in any other province of the empire. It was necessary to make out so many years of actual possession. If a man, some time after coming into possession, was dispossessed for a year, he could not claim a ten years' usucapion until the end of the eleventh year. And if any man asserted a claim of ownership against the possessor, the possession was held to be suspended as soon as the legal proceedings commenced, so that the claimant was in no danger of losing his right by a usucapion completed during the course of the proceedings.

The possession thus far described, as requisite to usucapion, had *bona fides* and *justa causa* as indispensable conditions. But possession without these conditions was also recognized as a foundation for legal rights. Indeed, we may reckon among the most remarkable features of the Roman law, the explicitness with which it acknowledged, and the elaborate machinery with which it defended, the possible rights connected even with a wrongful possession. Possession, to be effectual against a real owner, to give rights against an owner, must be accompanied by *bona fides* and *justa causa.* But possession which lacked one or both these elements might give rights against other would-be possessors. The principle was that an actual possessor, without reference to the ground or origin of his possession, should be defended by law against all persons whose title was no better than his own. If

Aulus had settled down upon a piece of land, knowing that he had no claim to it whatever, and when he had occupied it for a time, Titius stepped in without any better claim and drove him from the place, Aulus could invoke the help of the law, stating merely the facts of his possession and his forcible ejectment from it, and could thus obtain restoration to the ground on which he had squatted. The case would have been very different, if Titius had been the real owner of the land, or if he had been even a former possessor, whom Aulus without legal right had deprived of his possession: Aulus then could have found no assistance or protection in the law. Again, let us suppose that Aulus had received a horse as a *precarium*, or temporary gift to be recalled at pleasure of the giver. In this case, there is nothing wrong in the possession of Aulus, but it is a possession which could never lead to usucapion, for he does not believe himself to be owner, and he has no cause to believe it. It is a possession of which the owner can rightly deprive him at any moment. But if Titius, a third party, attempts to do so, the law will interpose in behalf of Aulus, to maintain his right, precarious as it is.

In treating of possession, as it appears in such cases, the Roman jurists distinguished a *corpus* and an *animus* (a body and a spirit). The *corpus* (or body) of possession consisted in the physical power to exercise control over the object, to treat it as one's prop-

erty. The *animus* (or spirit) consisted in the disposition to do so, to treat it as one's property. Both were alike essential to real possession. If a man borrowed a horse, he had the physical power to treat it as his own property; but while he regarded himself as a borrower, he could have no idea of treating it thus, and therefore had no possession in the sense we are now considering. If he was deprived of the horse, he could not obtain redress on the ground that he was a possessor: he must plead the right of keeping and using, which he had derived from the owner. His right was founded on an agreement with the owner, and not on a possession vested in himself.

There are many interesting points connected with this subject of possession (i. e., possession without *bona fides* or *justa causa*); but to point them out and make them clear would lead into too much detail. I will only add a word as to the causes by which the Romans were led to make so much of this doctrine, and to give it so full a development. One of these is to be found in the custom of the *precarium*, just adverted to. In early times, when a piece of property belonging to a debtor was pledged as a security for the debt, it usually passed at once into the ownership of the creditor, and remained *his* property until the debt was to be paid. Meantime, however, it was often suffered to remain in the possession and use of the debtor, as a *precarium*, or temporary concession, which the credi-

tor (the present owner) could recall whenever he chose. The frequency of this procedure made it necessary to recognize and protect the possession allowed in it. Again, when an action (or suit) was commenced to determine who was owner of a piece of property, the first question was, who should have possession of the property while the suit was pending, of course with the obligation of surrendering it if the suit should go against him. Thus every suit that turned on a disputed title furnished a case of temporary possession which required to be recognized and protected. Still again, the occupants of the public lands, the domain of the state, were not owners but possessors of their holdings. These lands, chiefly acquired by conquest in war, were sometimes divided among the citizens, and then became the property of individuals. More commonly, they remained the property of the state, but were occupied and enjoyed with public permission, by members of the ruling aristocracy. This occupancy or possession could never give rise to usucapion: it was always subject to the superior claims of the state. Though strong enough to maintain itself against the assaults of the Gracchi, and other popular leaders, it was in theory like a precarium, a temporary concession, which the state could recall whenever it chose. Here, then, possession had the widest field for legal as well as economical and political development.

The subject of the next lecture will be *Rights in the property of others.*

LECTURE VIII.

RIGHTS IN THE PROPERTY OF OTHERS.

JURA IN RE (sc. *aliena*) were rights naturally included in the *dominium* of the owner, but cut off and given to some one else. One property might be so related to another, that the first was subject to some power or control of any person who owned the second: such relations were called *servitutes praediorum rusticorum* or *urbanorum*, according as they pertained to lands or to buildings. Among the former were three rights of way, viz., *iter* (of simple passing), *actus* (of driving animals), *via* (of keeping up a road), across the ground of another; also *servitutes aquaeductus, aquaehaustus, pascendi, arenae fodiendae, lapides eximendi, calcis coquendae,* etc. Among the latter were *servitutes oneris ferendi, tigni immissi, projiciendi* or *protegendi, stillicidii, fluminis, cloacae, luminum, altius non tollendi, ne luminibus* (or *prospectui*) *officiatur.* General principles: 1. The two estates must generally (not always) be contiguous; 2. The right secured must be an advantage to the ruling estate, not to its owner merely; 3. The advantage to the ruling estate was a measure of the right; 4. The *servitus* could never consist *in faciendo* (by owner of subject estate), but usually *in patiendo*, sometimes *in non faciendo.*

Besides the *praedial*, there were *personal servitutes*, pertaining to the person, and hence limited to the life, of an individual. The most important was the *ususfructus*, full right to use and enjoy some property of another. The property, however, must be put to its natural use; and must be so used as to suffer no substantial injury. Hence, in articles of food there could be no usufruct; and none in money (*quasi*-usufruct). The usufruct might be created for a term of years, and must then cease at the end of the term. It might always be transferred from one person to another. But in no case could it survive the original usufructuary. And if by any transfer it came back to the owner of the property, it

ceased at once. It might also cease by non-user (the opposite of usucapion).

There was a more restricted usufruct, called *usus:* the usuary could not transfer his right to a third party; and he could only use the property for immediate personal wants of himself and his family; all further use and profit belonged to the owner.

To the *servitutes* praedial and personal of the *jus civile*, the prætors added other *jura in re.* Thus—1. *Superficies*, a right (resembling usufruct, but of longer duration) in some building erected on the (surface) ground of another. Usually it was perpetual, and subject to transfer or inheritance without limit. If conditioned, as it commonly was, on a ground-rent, it ceased upon non-payment of the rent.

2. *Emphyteusis*, a similarly perpetual transferable and inheritable right in the land of another; developed in the later empire, and named from the *planting* of waste tracts which it was designed to promote. If the *emphyteuta* wished to sell his right, he must first offer it to the owner, who might buy it for the proposed price, or, if another bought it, might claim a fee. It always ceased upon non-payment of the rent.

3. In early Rome, property used to secure a debt came into the ownership of the creditor (who often allowed the debtor to keep it as a *precarium*), and was called *fiducia*, as a trust committed to his faith for the restoration on due payment of the debt. But with this kind of security there was another, which finally supplanted it, by which the ownership remained with the debtor, and the creditor had a *jus in re* entitling him to sell the property in case of non-payment. A pledge of this kind was called *pignus*, and might be deposited with the creditor, or kept in the hands of the debtor. In the latter case it was a *hypotheca.* Any kind of property, present or prospective, might be hypothecated, and that over and over again, until its credit was exhausted. Unfortunately, there were no sufficient means for ascertaining previous hypothecations (though the debtor who failed to state them was liable to severe punishment); and the evil was aggravated by the admission of various tacit pledges (as of a tenant's furniture, for payment of the house-rent, etc.), as well as by giving preference to certain privileged debts (especially those to the treasury for public dues) without reference to the time when they were contracted. Such deficiencies in the Roman law of pledge must have added much to the difficulty of obtaining credit.

We have thus far considered property in its completeness, as including all the rights and privileges

connected with ownership. In this fulness of meaning it implies absolute and exclusive control over its object. It is the owner's right to do every thing which can lawfully be done with the object, and to keep all other persons from doing any thing whatsoever with it. This personal dominion, sole, entire, unrestricted, of the owner over the thing owned, belongs to the normal idea of property, and was emphasized by Roman, even more strongly than by modern, jurists. Yet they did not fail to recognize the existence of cases—exceptional cases—where property had less than this, its full extent; where the fulness of the owner's right, was limited by some right of a non-owner in the same object. Their theory of law admitted and provided for rights in the property of others, *jura in re aliena*, or, as they were usually called, *jura in re*, the word *aliena* being omitted as unnecessary. The oldest of these rights were mentioned in the Code of the Twelve Tables, and have a peculiar interest, from their connection with the simple agricultural life of the early Romans. They were called by the quaint name of *servitutes* (servitudes, or subjections). The subjection referred to in this case is of things, not persons: it is the subjection of one estate to another—the liability of one estate to be used for the advantage of another. It is easy to trace the conception which gave rise to the term. A country is free when it is subject only to its own legitimate ruler: if it is sub-

ject to another country, or to the ruler of another country, then it is in a condition of servitude. So an estate may be looked upon as free when it is subject only to its lawful owner; if it is subject in any respect to another estate, or to the owner of another estate, it may be regarded as being so far forth in a condition of servitude. And as one of the two estates was then said to be subject or serving, so the other was called the ruling estate. The relation, once created between the two estates, was permanent, and was not affected by a change of owners in one or both of them.

Among the earliest and most important of these *servitutes* were four which are often named together—*iter*, *actus*, *via*, *aquaeductus* (way, drive, road, water-drawing). The first three of these were rights of way. The owner of the ruling estate was entitled to pass over the ground of the subject estate, and the owner of the latter had no right to prevent him from doing so. It was this limitation of the power, that naturally belonged to him as owner, to exclude everybody from his grounds, which formed the essence of the *servitus*. And it was this privilege which did not naturally belong to the non-owner, of using another man's ground for purposes of transit, that constituted the *jus in re aliena* (or *jus in re*). But how do these three rights (*iter*, *actus*, *via*) differ from each other? The man who had the *iter* was entitled to go through his neigh-

bor's ground on foot, or even on horseback, and to have his slaves or his hired laborers go through. But there was one curious restriction, belonging evidently to the very earliest period, that no one in passing through should carry an upright pole (*hastam rectam ferre*), for fear of doing harm to the fruit trees. The man who had the *actus* was entitled to the privileges just described; but with them he had others which were not included in the *iter*. He could drive horses, oxen, or other beasts of burden, he could drive carts or wagons, over his neighbor's ground. But he was not allowed to drag heavy timbers or large masses of stone (*lapidem aut tignum trahere*), by which the surface would be broken up and disfigured. The man who had the *via* was entitled to all privileges included in the *iter* and *actus;* but he had one more which did not appertain to those *servitutes:* he could lay out and keep up a permanent track, a road, across his neighbor's ground—only just wide enough, however, for his own use; in the absence of any express agreement, the breadth of the track must not exceed eight feet, except at a bend or angle, where a breadth of sixteen feet was allowed. In this case he was not restrained from dragging heavy stones or timbers; if by doing so he injured his own track, he was himself the only sufferer. Nor was he restrained from carrying an upright pole, if, in laying out the way, care had been taken to avoid any fruit trees which might receive

injury from it. The three *servitutes* now described (*iter*, *actus*, *via*) were designed to meet a necessity which must have been of frequent occurrence in a population of peasant proprietors. The country about Rome, when she was only the chief city of Latium, was divided up into a large number of small farms or holdings, which were cultivated by the personal labor of the men who held them. It would often happen that a man had pieces of ground which were separated from each other by the land of a neighbor, so that to pass from one to another without going through the neighbor's land would require a long circuit with much loss of time and labor. In such a case it would be desirable for him to obtain more than the mere consent of the present owner to such a transit. He would wish to have an obligation imposed upon the land itself, so that the new owner, should such a one come in and be indisposed to concede the privilege, might be compelled to submit to it. This ready access to a field which would otherwise be more or less difficult to reach, was looked upon as an advantage to the field itself; being rendered more accessible, it would be more likely to receive due care and culture. And the business was viewed by the ancient Romans as a relation between the two fields or pieces of ground, one of which was constrained for the advantage of the other to endure the interference and use of a person not its owner.

But there were other advantages which an estate might receive from a neighboring estate, and accordingly other *servitutes.* Thus it might be desirable to irrigate one estate by carrying a stream of water across the ground of another—whence a *servitus aquaeductus;* or by drawing water from a spring or well upon the other estate—whence a *servitus aquaehaustus.* And it might be desirable to meet various wants of one estate by pasturing cattle on the other, or by digging for sand, by quarrying stone, by burning lime, etc., on the other—whence a *servitus pascendi, servitus arenae fodiendae, servitus lapides eximendi, servitus calcis coquendae,* and the like. These are, all of them, *servitutes praediorum rusticorum* (servitudes pertaining to rural estates); they were evidently designed to satisfy the demands of country life and labor among an agricultural people; though some of them might occasionally find application in towns, where pieces of ground owned by private persons and unoccupied by buildings were contained within the enclosure of the walls. But there were rights of a similar kind which related to buildings, and were therefore adapted chiefly to the wants of city life, though not without application to buildings in the country. These bore the corresponding name of *servitutes praediorum urbanorum* (servitudes pertaining to urban estates, that is, to buildings, these being usually the important thing in urban estates). Thus the proprietor of a

building might gain a right to rest his wall, or part of it, upon a wall or column belonging to his neighbor; this was the *servitus oneris ferendi.* The neighbor's wall or column was to this extent subject to the use and control of one who was not its owner; it must bear the burden of an alien proprietor. And the latter had a right to this service from his neighbor's property. It was not a right simply against the present owner. It could be maintained with equal force against any future owner. It was a right in the thing itself, a *jus in re aliena.* Similar to this was the right to have a timber of one's house inserted into the house or wall of a neighbor, the *servitus tigni immissi;* and the right to have a projection of one's building extend out over the ground of a neighbor, the *servitus projiciendi,* or *protegendi.* Closely connected with the latter was a right to have the drip of one's eaves fall upon a neighbor's ground, the *servitus stillicidii;* or, if the water from the roof was gathered by a gutter, to let the collected stream (*flumen*) fall upon the neighbor's ground, the *servitus fluminis;* or to have a sewer discharging in a neighbor's ground, the *servitus cloacae.* There were other *servitutes* designed to secure for buildings the advantages of light and air: thus a *servitus luminum,* which gave the right to keep windows in a neighhbor's wall; a *servitus altius non tollendi,* which restrained a neighbor from raising a wall, or any other structure, higher than he had when the *servitus* began; and a

yet more general *servitus ne luminibus officiatur*, or *servitus ne prospectui officiatur*, which prevented him from doing any thing which would be an injury to the existing light or prospect. It is not necessary to multiply examples: those already described will be sufficient to give clear ideas as to the scope and character of these praedial servitudes both of lands and buildings (*servitutes praediorum rusticorum et urbanorum*). But there are some important remarks of a general nature to be made concerning them—remarks which, with these examples in mind, you will be prepared to appreciate. FIRST, the two estates between which the relation exists must, in general, be contiguous to each other. This results from the nature of the services themselves. In some—as the *servitus projiciendi*, the *servitus stillicidii*, etc.—contiguity is evidently indispensable. And, in all, the advantages aimed at are such as would usually be sought from contiguous estates. But this was not a matter of universal requirement. Thus where the *servitus* consisted in a right of way, the estates might be separated by a public road, or a river, or a piece of common ground, which any man could cross at his pleasure. Or the two estates might be separated by a third, if this also was subject to a similar right of way. The *servitutes*, which were designed to secure window light and prospect, might be imposed on a distant estate, even if intervening ones were not subject to it, so long as these interven-

ing estates had no buildings on them, or none high enough to give annoyance. SECOND, the right secured by the *servitus* must be an advantage to the ruling estate—to the estate itself, not to its owner merely. Thus if A, being a carpenter, obtained the privilege of storing lumber on ground that belonged to B, this was no more a servitude of the kind we are now considering, than if A had obtained from B the privilege of walking in his garden. There would be an advantage to A personally, but none to the estate, the land, or house, of which he was the owner. THIRD, the advantage of the ruling estate is also a measure of the right. One who had the *servitus lapides eximendi* could take from his neighbor's estate all the stone that was needed for fences and walls upon his own; but this was the extent of his privilege. He could not take out stone and sell it for his own personal profit. FOURTH, the essence of the *servitus* could never consist in something to be done by the owner of the subject estate. There could be no *servitus in faciendo*. Most of the *servitutes* consisted *in patiendo:* the owner of the subject estate must submit to something—as another man's passing over his ground, the drip of another man's eaves, etc.—which an ordinary owner could prevent. And a few—as the *servitus altius non tollendi*—consisted in a *non faciendo:* the owner of the subject estate must not do, he must abstain from doing, something which an ordinary owner could do. But no such

thing as a *servitus in faciendo* was recognized by Roman law. It is true that when there was a right of way, the owner of the subject estate was required to remove any obstruction which might hinder the exercise of the right. But this was a mere incident: it was not the essence of the *servitus*. There was no *servitus* by which the owner of the subject estate could be compelled to make a road across his ground, or to draw water from his spring, or to take out sand from his bank, for the benefit of the adjoining farm. Such a requirement the Romans would have regarded as encroaching too deeply on that independence which is the natural condition of ownership. And, besides, it was excluded by their theory. According to the fundamental conception of the *servitus*, it was the thing itself, the estate, and not the personal activity of its owner, which was subject in part to another person's will or use. The right conferred was a *jus in* RE *aliena*, not a *jus in* PERSONA *aliena*, or *in* OPERE, LABORE *alieno*.

In the *servitutes* thus far considered, the praedial servitudes, the right of use which was secured did not attach to an individual person; it belonged to an estate, or, more correctly, it belonged to any person who might chance to be owner of that particular estate. But there were other *servitutes* which had a strictly personal character—the personal servitudes, as they were called—where the right of use vested in a par-

ticular individual, and of course terminated with his life. Though of later development, probably, than the praedial servitudes, they were both early and important. The most frequent and prominent among them was the *ususfructus* or usufruct, the life-long right to use and enjoy some property of another. The usufruct might be created by a contract between the owner of the property and the usufructuary, that is, the person who was to have it for his own use and enjoyment. But it was much more commonly established by a will or testament. It would often be the wish of a testator to provide for the wants of some person who was not his heir, and to do this without making a permanent division of his estate, or taking from the heir his eventual possession of the whole. This was readily accomplished by leaving to the person whom he wished to favor the usufruct of his property, or of some part of it—a farm, a house, a slave, a pair of oxen, or any thing else—while the ownership was vested in the heir. It was a bare ownership—in Roman phrase a *nuda proprietas*—so long as the usufruct subsisted. The usufructuary received possession of it, with full control, to make any use which he pleased, to gain any profit or advantage which he could. If it was a farm, he might cultivate it for himself, either consuming the products for his own wants, or selling them if he preferred to do so. Or, if he chose, he might lease it to another, receiving the rent as his own. He could even

transfer his right to somebody else, who would then have the same usufruct, the same extended privileges of use and enjoyment. Of course, he could transfer no more than what belonged to him: his right was a personal one, confined to his own life; if he died the day after having made the transfer, the person who received it from him had but one day's tenure; the usufruct expired with the usufructuary, and the owner obtained his full rights of ownership. I have said that the usufructuary could make any use of the object which suited his interest or pleasure. The statement requires some qualification. He must put the object to its natural and proper use. If he receives the usufruct of a pleasure-garden, he must not make it a vegetable-garden to raise cabbages for the market. And, what is more important, he must not use up the object. An owner may do so, if he likes, but not a usufructuary. He must use it as not abusing it; he must see that it receives no injury, suffers no deterioration, at his hands. This belongs, in fact, to the Roman law definition of the right: *ususfructus est jus alienis rebus utendi fruendi* SALVA RERUM SUBSTANTIA (the substance of the thing being unimpaired—without injury to its substantial value). It is worthy of remark that, according to the letter of this definition, a good many things are incapable of a usufruct. Thus, all articles of food: they do not admit of the *utendi fruendi salva rerum substantia*. A bushel of wheat or a

barrel of apples cannot be used without being used up. Here, use and consumption are the same thing. And this is also true, though it is not quite so obvious, in regard to money. It is among the things which perish in the using. If we use it at all, it must be in buying, lending, giving; and in all these cases we lose it. We may get something in place of it, which is of equal or greater value; but the things themselves, the *substantia rerum*, the metallic masses that we parted with, do not come back to us—unless they chance to be bad pennies, and these of course are *not* money. The Roman jurists, therefore, would not acknowledge a usufruct of money; though, in their desire to carry out the wishes of testators, they came at length to recognize a quasi-usufruct. For testators, being seldom learned in the law, would often set forth as legacies in their wills the usufruct of a designated sum, as a hundred or a thousand pounds. In such a case the person named as legatee was allowed to receive the amount of the bequest, on giving security that when he died the same amount should be paid out of his own estate to the *heres*, the heir of the testator. The relation here, though bearing some resemblance to the usufruct, was really quite different; the person who received the money became absolute owner of it; the heir had no ownership, nothing but the assurance of receiving an equal amount at some future time.

I have spoken of the usufruct as a life-long privi-

lege; and such it usually was. It might, however, be created for a term of years; and, in such cases, ceased on the expiration of the term. If the usufructuary died before that time, the right, being a strictly personal one, did not survive him. It always ceased with his death. Yet it might cease before his death, even when it was originally bestowed for life. It could be transferred, as we have seen, by the usufructuary to some one else; and by him to some one else; and so on without limit. But if by any of these transfers the usufruct came into the hands of the owner, it was immediately and finally extinguished. Uniting with the *nuda proprietas*, or bare ownership, which he before had, it lost its separate existence. He might, if he chose, create a new usufruct in the same object and for the same person; but it would be wholly distinct from the old one, which no power could bring to life again. And there was still another way by which a usufruct, and indeed any other servitude, might be terminated, namely, by non-user. If the usufructuary made no use of the object, if he did not derive or seek to derive any service or advantage from it, and if he persisted in this non-user for a certain length of time, he was considered as having abandoned his right, as having relinquished and thus lost all claim upon it. The effect was as if he had freely and formally surrendered his right to the owner of the property. So with praedial servitudes: a right of way, of water-drawing,

of burning lime, and the like, if it remained a certain length of time unexercised, became extinct. A *servitus non altius tollendi* was exercised so long as the neighbor's wall or house stood at the same height; if he undertook to build it higher, the owner of the *servitus* might compel him to take it down again; but if he acquiesced without legal opposition, this was a non-exercise of his right, which after a certain length of time became extinct. This forfeiture of a right by non-use is evidently analogous to that acquirement of a right by use (by usucapion) which we considered in the last lecture. And the time required to produce the effect was the same in both cases. By the earlier law it was one year or two, according as the object was a piece of movable or of immovable property: the usufruct of a horse was lost by a year of non-use, that of an orchard by two years. But Justinian changed these times (as he did for usucapion) into three years for movable property, and ten years (or, where the parties lived in different provinces, twenty years) for immovable.

Besides the usufruct, there was another and less frequent personal servitude, known as the *usus*, which may be described as a restricted usufruct. The usuary, that is, the man who has the *usus* of a thing, could only use it to satisfy the immediate personal wants of himself or his family: this was *usus* in the strict sense of the term. Whatever else could be made out of the

thing in the way of profit or advantage came under the designation of *fructus*, and was not included in this right. The usuary of a house could occupy it with his family, but he could not rent it to another person. If there were any months in the year when he did not care to occupy, the owner had the disposal of the house during such times. The usuary of an orchard could take as much of the fruit as he wanted for the consumption of himself and his family; that was the proper *usus* of the fruit. But he could not seek his profit by disposing of any part to others; that would have been, in the law-sense, *fructus* of the fruit. If there was more than the usuary wanted for family consumption, that was at the disposal of the owner. The usufruct, as we have seen, was a transferable right; the *usus*, on the contrary, could not be sold, or given away, to any one except the owner of the property. The usufruct, while it existed, withdrew the object altogether from the service of the owner, giving all its capabilities and products to another person; the *usus*, on the other hand, left to the owner a chance at least of sharing with the usuary in the service and advantage to be got from his property.

The *servitutes*, praedial and personal, were the only *jura in re* (rights in the property of others) which were recognized and maintained by the earlier Roman law, the *jus civile* strictly so called. But the class of *jura in re* was afterward increased by two or three

institutes, which ought not to be passed over without notice. One of these was called *superficies.* The word properly denotes the surface of the ground; but the reference in this term is to that which stands on the surface, the building which rises from and is supported by the surface. We saw in the last lecture that the building was regarded as a mere accession of the soil. The owner of the ground was owner of any building erected upon it. There was no possible way in which a man could become owner of a building without being also owner of the ground on which it stood. But the developed Roman law allowed a man who was not owner of the ground to have a right in the building, a *jus in re aliena,* which was not widely different from ownership. This right was called *superficies.* The person to whom it belonged (the superficiary) had all the privileges of the usufructuary; he had the entire control and profit of the building while he lived. But he had more than these. His right was not confined to his own life. When he died, it passed to his heirs; and, if they kept it till death, to their heirs; and so on. If he chose, the superficiary might lease his right; he might pledge it for a debt; he might sell it, and the buyer could do all the same things with it, either disposing of it to others, or keeping it till his death and leaving it to his heirs. This right could be created in several different ways: the most common was by a contract with the owner of the ground, who in

consideration of a fixed annual payment, a ground-rent, granted the right of *superficies* with all the incidents belonging to it. The contract might be made for a definite time, but only for a very long one: the right then ceased when the time had elapsed. Otherwise, it was a perpetual right; there was no reason in the nature of the case why it should not continue forever. Of course, however, a failure in the payment of the ground-rent worked a forfeiture of the right. If the building was burned down or otherwise destroyed, the right naturally ceased, the object to which it attached being no longer in existence; but the superficiary was allowed to replace it by another building with the same right. The right might also cease by voluntary renunciation of the superficiary, or in a series of transfers it might come into the hands of the owner, and thus be merged in full ownership. In cases where there was no ground-rent, the chance of some such termination of the *superficies* was the only valuable interest which remained to the owner. The right of *superficies* had its sphere of application in cities, where it would often be an object with owners of the ground to obtain an assured and constant revenue from their property, without the trouble of insuring buildings, keeping them in repair, paying public charges on the ground or buildings, etc., which ordinary owners of property were subject to.

There was another right, similar in nature and ex-

tent to the foregoing, but adapted to estates in the country and to the cultivation of the soil. It was a perpetual lease of land for a fixed annual payment. For a long time it was confined to public lands, the property of the Roman Government or of a municipal corporation; but eventually it was extended to lands owned by individuals. In the Corpus Juris it has the name of *emphyteusis*, a Greek word which signifies "planting," and in this use points clearly to unfortunate circumstances of the declining empire. Owing to the constant and harassing inroads of the barbarians, immense tracts of land were made desolate. In the perils and anxieties of those times, there was little inducement to reclaim these desolate lands. It was a common thing for men even to abandon their own lands, in order to escape the burdensome taxes which they had to pay upon them. In opposition to these tendencies, it was a leading object with the government to promote the planting and cultivation of wasted and forsaken lands. And it was mainly to encourage this kind of planting (*emphyteusis*), that the right of which we speak was recognized and protected during the two centuries before Justinian. The person who received the right was called *emphyteuta* (planter) or *emphyteuticarius*. By contract with the owner of the ground, he obtained a certain piece of land with the obligation of a certain annual payment agreed upon between the two. He could then treat the ground

obtained almost exactly as if he were an owner. He could keep it through life and leave it to his heirs. He could lease it to a tenant, or pledge it to a creditor. He could sell it to a buyer, who would gain the same extended rights, but with the same obligation of annual rent-payment. In case of a sale, however, he must first offer it to the owner at the same price; and the owner, if he did not take it, was entitled to a fee for his acceptance of the new occupant. As the powers and privileges of the *emphyteuta* were much like those of the superficiary, so the right of *emphyteusis* terminated, under much the same condition as that of *superficies*, and the chance of such a termination was nearly the only interest (aside from his rent) which was left to the owner of the property.

As the *emphyteusis* is essentially a perpetual lease of land, it may occur to you to inquire whether an ordinary lease for a limited time is not also a *jus in re*. I answer, "No:" an ordinary lease was regarded as a mere personal contract, imposing obligations on the two parties, but conveying no title to the land itself. If an ordinary lessee was disturbed in his possession by some third party, if he was ejected from the land which he had leased, he could not bring an action in his own name against the intruder; he could not claim that any right which he himself had in the thing was violated. He could only fall back upon the lessor, claiming that by his contract the lessor had engaged

to secure him in the possession of the land, and insisting that he should now fulfil that obligation. But the *emphyteuta*, if similarly disturbed, was not obliged to fall back upon the owner of the ground; he could bring an action in his own name against the invading party; he could plead his right in the land, his *emphyteusis*, showing that it had been unlawfully invaded, and demanding compensation and redress for the invasion. The reason for making such a distinction in favor of the *emphytéusis* and the *superficies*, was evidently the perpetuity of these rights and the full control which they gave over their objects, two qualities which invested them with a character not widely different from ownership.

There remains to be noticed only one more *jus in re*, that which the law accorded to a creditor in the property of his debtor when pledged for the payment of the debt. This, however, was not a feature of the earliest Roman law. Under the earliest law the creditor obtained the ownership of the pledge. The debtor by a formal act of sale transferred to his creditor the field, or horse, or plough, or whatever other piece of property was to serve as a security for the debt. The creditor bound himself at the same time, and as part of the same legal transaction, to restore the property to the debtor by a similar act of sale, in case the debt should be discharged when it became due. This conditional engagement of the creditor to restore the thing

received on payment of the debt was called *fiducia* (or trust). The same name (*fiducia*) was applied to the article itself, the piece of property, which passed in this way and for this purpose from the debtor to the creditor. As the creditor was owner of the article, he could make any use of it that he pleased, provided that use was not inconsistent with his obligation to restore it when the debt was paid. It was a very common thing to leave it in the hands of the debtor as a *precarium*, or temporary gift, to be recalled at pleasure of the giver. Such indulgence the creditor could show to the debtor without endangering his own interests; but he was in no way bound to show it. If the debt was not paid when it fell due, he could sell the article as it was his own property, and use the proceeds for the satisfaction of his claim. If they were more than sufficient for this purpose, he must give the excess to the debtor: this was an obligation imposed upon him in connection with the *fiducia*. The process here described seems to have been the earliest method known to the Roman law of providing security for the payment of a debt. It was still used in the time of Gaius, but has no place in the Justinian system. With it we find another method, doubtless very ancient, which, from its greater pliancy and convenience came to be the prevailing one, until at length the former disappeared altogether. By this the ownership of the article which was used as a pledge for the debt

remained with the debtor. What the creditor received was merely a *jus in re;* it was the conditional right of selling the article in case the debt should not be paid. The debtor's right of ownership was subject to this limitation. He must do nothing with the property which would interfere with the eventual right of the creditor, and in case of non-payment of the debt he must submit to the creditor's exercise of his right —he must allow his property to be taken and sold by, and for the benefit of, another. The property thus made subject to the creditor's *jus in re*, was called *pignus*. It might be placed in the hands of the creditor as a *pignus depositum*. But it might also remain in the hands of the debtor; and this came to be more and more the prevailing practice. For such a *pignus* which continued in possession of the debtor till occasion might arise to sell it for the creditor, the jurists had a special law-term *hypotheca*, borrowed from the Greek: our English verb *hypothecate* is formed from this term, and signifies "to make a pledge of this kind, to pledge a thing without giving up possession of it." The *hypotheca* lent itself readily to a wide range of application, and received in Roman law a very extended, and indeed excessive, development. First, as to the things pledged. Whatever had a money value, whatever could be sold for money, might be pledged in this way. Not only corporeal things, but also incorporeal, such as claims and rights, claims for money or labor

from other persons, rights in the property of others, a right of way over a neighbor's ground, a usufruct in a slave, a right of *superficies* or *emphyteusis*. Not only things present, but also things to come, things expected in the future; the growth of wool to be taken from one's flock next year, the produce of his wheat-field five years hence. One might even pledge something which belonged to another person, the pledge being conditioned on a future acquisition of that thing by the pledger. One might pledge an inheritance which he looked for, of course on condition that the expected inheritance should actually come to him. One might pledge his whole estate, the aggregate of all his property relations (which, as we have seen, was an incorporeal thing), for the payment of a single debt. Next, as to repeated pledging of the same object. It was a disadvantage of the old *fiducia* that a piece of property could only be pledged for one debt at a time. The value of the property might be tenfold greater than the amount of the debt; yet the debtor could not use that excess of value to obtain any further credit, unless it were from the creditor into whose ownership the thing had passed. But the same piece of property might be hypothecated over and over again, to any number of persons, until its credit was exhausted, until the aggregate amount of the claims to be secured by it was equal to the probable value of the property. But if this was an advantage, it was also a danger of

the *hypotheca.* The creditor must always fear that the security offered him had been impaired by previous hypothecation. There was no requirement of a prescribed form or of a public record to authenticate the existence of a *hypotheca.* The creditor had to depend very much on the representations of his debtor. It was the duty of the latter, whenever he pledged the property, to make known the existence and extent of previous pledges, and he was threatened with severe punishment if he failed to do so. But this was only an indirect, and often an insufficient help to the creditor. The difficulty was greatly aggravated by the admission of tacit pledges for particular kinds of claims or obligations, pledges which required no express agreement, as they were established and enforced by law. Thus, if a man lived in a hired house, his furniture was subject to a tacit pledge for the payment of the rent. If the owner of a ruined building borrowed money for its restoration, the new building was subject to a tacit pledge for the payment of the loan. The inheritance which came to an heir was subject to a similar pledge for the payment of any legacies enjoined in the will of the testator. The whole property of a guardian was subject to a similar pledge for any claims against him arising from the administration of his guardianship. And from the time of Caracalla, the whole property of everybody was similarly pledged for public dues and taxes. But there was still another

aggravation of the difficulty. When a piece of property was sold for the benefit of several creditors to whom it had been successively pledged, the regular course of things was, that the one to whom it was first pledged should be first satisfied from the proceeds, and then the others in the order of time. If this course had been invariable, much complication might have been avoided. But there were numerous exceptions to it: particular claims, as those of the treasury for public dues, were specially favored, being allowed to take precedence of those that were earlier in time. Amid all these sources of confusion and uncertainty, it must have been excessively difficult to ascertain the real worth of any proposed security; and, as a necessary consequence, it must have been much more difficult than it would otherwise have been, for those who were in want of credit to obtain what they needed. The Roman law of pledge appears to me the weakest part of their system; the only part, perhaps, of which one could say that it was really ill adapted to the ends for which it was created.

The subject of the next lecture will be the *law of obligations*.

LECTURE IX.

LAW OF OBLIGATIONS.

No other part of the law so thoroughly worked out by Roman jurists, or so influential on modern systems. We first describe the particular obligations, then state general principles which apply to all of them or to certain classes.

I. VERBAL CONTRACT.—Instead of written notes, the Romans used the verbal *stipulatio*, consisting of a formal question (*Do you promise*, etc.; *will you give*, etc.), with corresponding answer. If *spondeo* was used by *stipulator* and *promissor*, it was a *sponsio*, and was confined to Roman citizens. If the two parties had different things in mind, the stipulation was invalid. If they lived in different places, an agent might be used; who, however, could not say, *Will you give Aulus five hundred aurei*, nor *Will you give me as agent of Aulus*, neither form being generally valid. But he might say, *Will you give me five hundred aurei*, and afterward transfer (*cede*) his claim to Aulus; or else, *Will you give Aulus five hundred, or, failing that, give me one thousand.*

II. LITERAL CONTRACT (with written letters as formal basis of the obligation): none such in the Justinian law, the old use of *codices* or account-books for this purpose (retained longest by the *argentarii*, brokers) having become obsolete.

III. REAL CONTRACTS (where the formal basis of obligation was a thing delivered or rendered): such were the *mutuum*, *commodatum*, *depositum*, *pignus*.

(*a*) *Mutuum*, a loan, usually of money, which, to be of use to the receiver, must become his property, but with the obligation of equivalent

return. There could also be a *mutuum* of other *fungible* things (consisting in number, weight, and measure). Interest was promised by a separate contract: the maximum rate varied at different times, but never exceeded twelve per cent., except in the *nauticum fenus*, which was a kind of insurance, as the debt ceased if ship or cargo was lost without fault of the borrower.

(*b*) *Commodatum*, a loan of movable property, to be used (not owned) by the receiver, and returned without compensation.—(*c*) *Depositum*, resembling the *commodatum*, but not to be used by the receiver.—In the *mutuum*, the receiver must bear *all* loss or injury of the thing received: in the *commodatum*, only what strict care might have prevented; in the *depositum*, only what came from his own *dolus* (fraud) or *lata culpa* (gross negligence).

Further, any nameless agreement to mutual services became a *real* contract, with binding force, as soon as either party had rendered his promised service.

IV. Consensual contracts (in which, contrary to the general rule, the mere agreement of the parties was a ground of obligation):

(*a*) *Emptio venditio* (buying and selling). Payment must be in money; otherwise the business was a *permutatio rerum*. Until *traditio* (transfer of possession, delivery), the ownership remained with the seller; but (except in fungible things) any loss which strict care could not have prevented fell upon the buyer. The seller, if he acted *bona fide*, was not responsible for a defect of title, until actual eviction of the buyer. For defects in the article, unless they were obvious, he was always responsible.

(*b*) *Locatio conductio* (letting and hiring). Payment must be in money. The *locator* retained his ownership, and could at any time sell the property, only with a liability in damages to the *conductor*.—Under this head came also the hiring of labor (*locatio operarum* by the laborer).

(*c*) *Societas* (partnership), agreement to hold certain property in common, for the common gain of the parties. Lucrative use essential. *Societas totorum bonorum*, or *alicujus negotiationis*. The ratio of contributions might be any whatever; and any shares of loss or gain might be fixed in the contract; but no party could be wholly excluded from the gain (*societas leonina*).

(*d*) *Mandatum* (commission) agreement to fulfil some order without compensation (but the *mandator* must pay all reasonable expenses of the *mandatarius*): it was much used by the Romans. Thus, a *procurator* to conduct one's case in court was appointed by mandate; and, if appointed

procurator in rem suam, received the case with all its liabilities as his own. Any claim, or right of action, could thus be transferred (*ceded*) to another.

No other part of the law-system was so thoroughly worked out by the Roman jurists as the law of obligations. No other part has been so fully taken up into the juristic systems of the modern world. It is highly complex; for it embraces a great variety of transactions and relations. There are, indeed, certain general facts and principles which apply to all obligations or to large classes of them. These, if we pursued a philosophic order, should be set forth at the outset. But, without knowing what they apply to, you would perhaps fail to understand them readily or perfectly. It seems better to begin with the single obligations, and to form a distinct conception of each, before looking at their common features and characters.

Among us, if a person wishes to lay himself under a definite and formal obligation, the most common way is to give his note, his written promise to pay a certain sum of money to a certain person. It is remarkable that this form of contracting obligations, which seems to us so simple and natural, was unknown to the Roman law. But it must be remembered that the law-forms used by the Romans had their origin in times when writing was neither easy nor common. It is not surprising, therefore, that among them a form of spoken words, a verbal contract, should hold the place

which among us is occupied by written notes. This form —called by a name of uncertain derivation, *stipulatio* —was of a very simple character, consisting only of a question asked by one party, and an answer returned by the other. The questioner or demandant, the *stipulator* (as he was called), designating in his question the money to be given him or the service to be done him, asked the other party whether he would give it or do it; to which the respondent, the *promissor* (as he was called), made answer that he would. In the phraseology used there was a good deal of variety. Of frequent occurrence was the verb *spondeo*, but only among Roman citizens: no alien could use it either in the question or the answer of a stipulation. Such forms as *Spondesne mihi decem aureos dare* (do you engage to give me ten aurei, or gold-pieces): answer, *Spondeo* (I engage); or *Spondesne mihi Stichum servum dare* (do you engage to give me Stichus as slave): answer, *Spondeo;* or *Spondes quinque dies in horto meo laborare* (do you engage to work five days in my garden): answer, *Spondeo;* all such forms had the special name of *sponsiones*, and belonged only to the *jus civile* in its narrower sense. But other forms of stipulation—such as *Promittis mihi decem aureos dare* (do you promise, etc.), or *Dabis mihi Stichum servum* (will you give, etc.), or *Quinque dies in horto meo laborabis* (will you work, etc.)—belonged to the *jus gentium*, and were open to aliens not less than to citizens. It

was required, however, until a late period that the binding word in the answer should be the same that had been used in the question. To the question, *Promittis mihi decem aureos dare*, the answer must have the word *Promitto;* to the question *Dabis mihi Stichum servum*, it must have *Dabo;* to the question *Quinque dies in horto meo laborabis*, it must have *Laborabo.* But this requirement was given up before the time of Justinian: the Corpus Juris requires only that there should be a real agreement in meaning and purpose between the utterances of the two parties. This agreement was absolutely essential to the validity of the stipulation. If the promiser who had agreed to give Stamphilus as slave could show that he meant Patichus, though by mistake of name he had called him Stamphilus, the stipulation was invalid: the promiser was free from any obligation. So, if the stipulator said, "Will you give me ten aurei on the calends of next January," and the promiser replied, "I will give them to-day," the stipulation was invalid. If the stipulator said, "Will you give me ten aurei in case Titius shall marry my daughter," and the promiser replied, "I will give them without condition," the stipulation was invalid. In both cases the promiser undertook more than the stipulator asked: to pay now is more of an undertaking than to pay next New-Year's day: to pay at any rate is more than to pay on the fulfilment of a yet doubtful condition. Yet though he

had promised more than was asked of him, he was not bound to do even what was asked: the parties had had different things in mind, and there was no bargain between them. So, if he promised ten aurei when the stipulator said five, or promised five when the stipulator said ten. In this case it appears that some jurists recognized an obligation for five aurei, arguing that to this extent there was a coincidence of will between the two parties; but the prevailing opinion was, that the parties had different objects in mind, so that no contract, no obligation, existed between them.

By written notes, such as we use, a man can lay himself under obligation to any person, however far away. The nature of the stipulation as a verbal contract rendered this impossible. The parties must be in presence; they must be within speaking and hearing distance of each other. Such a requirement seems hardly consistent with the demands of an extended business. In commercial affairs it must often have been necessary to create obligations between persons who were hundreds of miles apart. How could this be accomplished? How could Numerius in Naples assume a debt of five hundred aurei to Aulus in Alexandria? For Aulus and Numerius to come together face to face, so as to go through with a direct stipulation, would perhaps be impossible, or, if possible, not worth the time and trouble it would cost. If Aulus had a son under his *potestas*, or a slave, whom

he could send to Numerius, the business was easily managed; the son or slave could act as stipulator, acquiring the obligation, not for himself, but for his father or master. But if Aulus could do this by a son or a slave, could he not do it by some independent person? Could he not employ Titius, living in Naples, to stipulate in his name? Such a procedure seems to us obvious enough, but there was a difficulty in the way of it. If Titius, as stipulator, put the question, "Do you promise to give Aulus five hundred aurei?" and Numerius answered, "I promise," the transaction was generally invalid. Titius could not stipulate thus for another, without prospect of advantage to himself. To make the contract binding, the stipulator must have an interest of his own in its fulfilment. If Titius, being in debt to Aulus, put the question, "Do you promise to give Aulus the five hundred aurei which I owe him?" then if Numerius answered, "I promise," it was a binding engagement: the stipulator was of course interested in the fulfilment which was to release him from his own debt. That the stipulator must have a personal interest in the contract, was not an arbitrary rule: it was founded in the nature of the case. If the promiser did not fulfil his undertaking, the right of action, of prosecution for the breach of contract, belonged to the stipulator, the other contracting party. It was a means of redress for any injury that came to him through the failure of the promiser. But if he

suffered no injury, he could claim no redress. If Titius obtained a promise for Aulus without interest of his own, then if the promise was not kept, Titius could not sue, for he suffered nothing; and Aulus, who did suffer, could not sue, for he was not a party to the contract.

But why, it may be asked, could not Aulus appoint Titius as his representative, so that the acts and utterances of Titius in the business of Aulus should be considered as proceeding from Aulus himself? The answer can only be, that such was not the custom of the Romans. The principle of representation was not, indeed, unknown to the Roman law. If a slave, as stipulator, put the question, "Will you give me five hundred aurei?" it was the master's voice that spoke through him; he was his master's representative, whether he wished it or not. In like manner, the son under his father's power was often the necessary, involuntary representative of the father. Representation by free persons—that is, persons not dependent as sons or slaves on those for whom they acted—was frequent in suits at law, where either party might appoint a *cognitor* or *procurator* to take his place, to appear as his representative, in the conduct of the suit. Whether it was allowed at all in obligations—whether Aulus could assume or acquire any obligation by a free person acting in his name—is a disputed question; but it certainly was not allowed in stipulations. Perhaps this

was a defect in the law-system of the Romans. By the admission of free representatives, they might have avoided some difficulties in widely-extended business relations, difficulties which they found other means of avoiding, but means less simple and convenient than this principle would have given them.

How, then, was the difficulty avoided in this case? How was the obligation for five hundred aurei established between Numerius and Aulus living in Naples and Alexandria? There were two ways of doing so. Titius, the intermediate actor employed by Aulus, might first stipulate in his own name ("Do you, Numerius, promise to give *me* five hundred aurei?"); and then, by a simple process, he might *cede* to Aulus, turn over or transfer to Aulus, the right of action which this contract gave him against Numerius. Titius here was not a simple representative, he did not gain the claim immediately for Aulus: he gained it first for himself, and afterward transferred it to Aulus. Or, again, Titius could put the stipulation in this form: "Do you promise to give Aulus five hundred aurei, and, if you fail in that, do you promise to give me a thousand?" This, when answered in the affirmative, made a valid contract; for Titius evidently was interested in the fulfilment. True, it did not absolutely bind the promiser to Aulus; it only brought upon him an alternative obligation to Aulus or to Titius: it gave him his option between a debt of five hundred to

Aulus or a debt of one thousand to Titius, but there could hardly be any practical uncertainty as to his preference.

A stipulation might be reduced to writing and attested by the signatures of the contracting parties, or by that of the promiser only. In such cases, however, it must not be supposed that the obligation was in any way founded on the writing. It was founded wholly on the spoken words of the stipulation; and the writing was of use only as a proof that a stipulation formal and binding had actually passed between the parties. But in the times of Cicero and Gaius, there were contracts in which the writing itself was recognized as the formal ground of obligation. It seems to have been an early and general custom of the Roman householders to keep *codices*, or books of accounts, with separate columns for debit and credit. If Titius, then, proposed to bind himself to pay Aulus a hundred aurei, it could be done by means of these account-books. If, by concerted action of the parties, Aulus entered one hundred aurei in the credit column of his book as advanced to Titius, and Titius under the same date entered one hundred aurei in the debit column of *his* book as due to Aulus, the effect was the same as if a stipulation had passed between them. These literal contracts (as they were called)—the obligation being created by written letters and not by spoken words—seem never to have had any great importance. They

remained in use for the mutual transactions of the *argentarii* (or brokers), long after they had become obsolete for other persons. But before the time of Justinian they had disappeared altogether. In the Corpus Juris there is no literal contract, properly so called, no use of writing as the formal ground of an obligation. That some formal ground was necessary, that a mere informal agreement of two persons was not sufficient to establish a full legal obligation, was the general principle of the Roman law, though subject (as we shall soon see) to some ancient and important exceptions.

But we have not yet exhausted the contracts which had a formal basis. This might consist, not in words spoken or written, but in some thing, some object, whether money or other property, delivered by one party to the other. These were the real contracts, so named from the *res* (or thing delivered) which was the formal basis of their obligation. They were four in number, the *mutuum*, the *commodatum*, the *depositum*, and the *pignus;* of which the first three require a few words of description.

The *mutuum* was a loan, most commonly a loan of money. The obligation took its rise from the delivery of the money, its passage from the hands of the lender into those of the borrower. It not only passed into the hands of the borrower; it became his property. Such was the Roman theory of the transaction. There was a transfer of ownership from one party to

the other. Without this it seemed to the Romans impossible for the receiver to make use of what he received. If the lender retained his ownership in the money, he was entitled to demand again that very money, the same identical pieces of gold or silver that he had advanced. But with such a requirement the loan would be practically worthless. The borrower, if he used the pieces, must throw them into the ever-flowing channels of business, where they could never again be identified or recovered. It was necessary, then, according to Roman ideas, that the borrower should become owner of the money; but at the same time and by the same act he came under an obligation; he was bound to return an equivalent amount of money to the lender. Now, there are other things besides money which disappear and are lost with the using. Such are grain, wine, oil, dye-stuffs, and the like. Of all these things the Roman writers say that "they consist in number, weight, and measure." If a man was entitled to ten aurei, and had to take them from a pile of those coins lying before him, it was a matter of perfect indifference what particular ones he took: he thought only of the number: any one set of ten would do as well as any other. If a man wanted a quart of wine, of a designated kind and quality (as best Falernian of ten years' standing), and had to take it from a cask that stood before him, it was matter of indifference what particular quart he took, whether it came

from the top of the cask or from the bottom: it was only the measure that he thought of. For this important class of things—in which, if the kind and quality be determined, the individual substances are no longer of account, but only the amount or quantity—the Romans had no single name; modern writers have called them fungible things (from *fungor*, to discharge an office), because a given amount, a pound, for instance, will do duty for, will perform the part of, any other pound. It was necessary to describe them here, because all fungible things, and only such, could be objects of a mutuum. There could be a mutuum of wheat, of wine, of oil, etc., as well as of money; but not of a piece of ground, a slave, a horse, a plough, a book, and the like. The obligation imposed by this contract was only that of equivalent return. The borrower of money, if he was bound only by the mutuum, was simply required to pay back the principal. If the lender wanted interest—and Roman lenders wanted it not less than those of modern times, and were accustomed to have it too—it must be promised by a special contract, connected with the mutuum, yet distinct from it. When the money was delivered, and the mutuum thereby consummated, the borrower bound himself by a verbal contract, by a formal stipulation, to pay interest upon it. The rate of interest could be fixed by agreement of the parties, and expressed in the words of the stipulation. Only it must in no case exceed the

maximum allowed by law, which varied with the legislation of different periods, but never rose above the so-called *centesima usura*, that is, one per cent. a month, or twelve per cent. a year. Yet there was one species of mutuum, of a quite peculiar character, in which, prior to the time of Justinian, there was no restriction on the rate of interest. This was the *nauticum fenus* (or shipper's loan), which had the form of a loan, but served the purposes of insurance. The owner of a merchant-vessel could borrow money on his equipment and cargo, with the express agreement that, if the vessel should be lost or the goods destroyed by any accident of the sea, without fault on the owner's part, then the obligation of the mutuum should cease, the money lent should never be repaid, the borrower should have it to cover the loss he had sustained. The risks of the sea being thus thrown upon the lender, he was allowed in his agreement to name a rate of interest beyond the limit fixed by law for ordinary lenders. This higher interest continued as long as the peculiar risks continued, that is, until the vessel reached her port: if the loan was not paid then, the interest accruing from that time on was reckoned according to the legal maximum.

Next, the *commodatum*. This also was a loan. It was a loan of some object, some article of movable property, to be used by the borrower and to be returned to the lender, without compensation, at a time

fixed in the agreement. The object of the commodatum must be movable property: if a field or a building was given up to another, to be held and used for a designated time, the result, by the Roman law, was a *jus in re*, a right of *usus*. The ownership of the commodated object did not pass to the receiver; it remained with the lender; and to him must be returned the same object, the same individual thing or things, that he gave: in these points the commodatum differed from the mutuum. The object was to be used by the receiver for his own service and convenience, and was thus distinguished from the object of the *depositum*, to be noticed presently. The kind of use, if not specified when the contract was made, must be that which naturally belonged to the object: a horse trained for the saddle must not be set to ploughing or carting. The use conceded in the commodatum was a gratuitous use: if any compensation was required, the transaction had a different character: it was a *locatio et conductio* (letting and hiring). And, lastly, the object could be kept throughout the designated time: in this respect the commodatum differed from the *precarium*, the mere permission to keep and use an object until the owner saw fit to reclaim it. The precarium (as we have seen) was a thing of frequent occurrence among the Romans; but as it rested merely on the sufferance of the owner, and was terminable at his sole pleasure, it was not reckoned among contracts or obligations.

Next, the *depositum:* the name explains itself and hardly calls for definition. Like the commodatum, it was confined to movable property. If a person had in his charge the land or house of another, without the right of using them, he was looked upon as a *mandatarius* (or agent) of the proprietor rather than as holder of a deposit. It was matter of course that the depositary (the keeper of the deposit), having no right to use the object kept, paid nothing for it; but neither could he demand pay for keeping it. Or rather, if he demanded pay, he ceased to be a depositary: the contract was no longer called a depositum: it was a covenant which the law would recognize and enforce, but for which it had no special name. There was an interesting difference between the mutuum, the commodatum, and the depositum, as regards the risk of loss or injury to the object received. The receiver of the mutuum became owner of the object, and with this ownership took the entire risk upon his shoulders. If the purse of gold was torn from him by robbers, if the heap of grain was burned by enemies in the barn that held it, this made no jot of difference in his obligation: he must return a full equivalent in kind, quality, and quantity, to the lender. In the commodatum, the ownership remained with the lender: the receiver was only responsible for careful use and keeping. If the object was injured or destroyed by any accident which he had not the power of preventing, the loss fell upon

the lender. The lender must bear even the gradual deterioration caused by using the object, so long as it was used in a natural and proper way. And yet, as the receiver obtained from the contract an advantage for which he was to make no compensation, he was bound to exercise the strictest care. It was not enough that he treated the object with the same care as he was wont to exercise for his own property. The utmost possible care was exacted of him: if any attention, any vigilance, any effort on his part, could have prevented the loss, then the loss must fall upon him. But the receiver of a deposit obtained no advantage from the object; he simply rendered an uncompensated service. Hence he was not bound to exercise any special care, not even so much care as he was in the habit of using for his own property. He was responsible, of course, for any *dolus*, any fraud or sinister intention of his own; for any harm that might come to the object with his knowledge and consent. He was responsible also for what was called *lata culpa*, that gross negligence, that extreme recklessness, which implies a kind of depravity, and is not always distinguishable from *dolus*. But for any ordinary negligence he was not held accountable. It was considered rather as the fault of the depositor, if he intrusted his property to a slack and shiftless keeper.

Of *pignus* (or pledge) we spoke in the last lecture. Deposited in the hands of the creditor as security for

a debt, it was subject to his *jus in re*, his right, if he was not paid in time, to sell it and obtain his satisfaction from the proceeds. But with this right went an obligation on his part to restore the thing unharmed in case the debt was paid according to its terms.

The mutuum, commodatum, depositum, and pignus, were the most important of the so-called real contracts. They were the only ones that had specific names. But they did not by any means constitute the whole class. Every nameless agreement, of whatever kind, by which two parties engaged themselves to mutual services of giving or doing, was brought under this head as soon as either party performed the service which he had promised. If Aulus engaged to give a horse to Titius, and Titius to build a barn for Aulus, each service being in consideration of the other, it was not at first a binding contract; the mere agreement of the parties did not suffice to make it so: Aulus was not bound to give the horse, nor Titius to build the barn. But if either of the two fulfilled his promise, the case was altered: it was no longer a mere agreement: there was a *res*, a thing given or done, by one party to the other, which changed the agreement into a real contract, and the remaining party was now bound to perform his part. If Aulus had given the horse, Titius could not refuse to build the barn, and *vice versa*.

The principle of the Roman law, to which we have

now several times alluded, that the mere agreement of two parties did not make a binding contract, must not be taken for a universal principle. It had very important exceptions, which the Romans were brought by the necessities of business to recognize and admit from the earliest period. The four contracts which were called consensual, because the mere *consensus* of the parties made them binding, were of constant and indispensable use. They were—1. Buying and selling; 2. Letting and hiring; 3. Society; and 4. Mandate. Let us look at these in order.

First, then, the *emptio venditio* (buying and selling). The seller agreed to bring a piece of his own property into the possession and ownership of the buyer; in return for which the buyer agreed to give the seller as price a definite amount of money. Nothing more than this was necessary to impose upon each party a full legal obligation to perform his part of the agreement. But was it necessary that the equivalent promised by the buyer should be in money? Might not Titius agree to pay in a hundred bushels of wheat for the plough which Aulus was ready to sell him? He could do so, unquestionably; but the transaction then assumed a different character. It was not an *emptio venditio*; it was a *permutatio rerum* (an exchange of wares, a barter). It was not a consensual contract: the mere agreement did not make it obligatory. It fell under the class of nameless engagements

just now described, engagements which were not obligatory until one of the parties had performed his promised service. The contract of sale (that is, the agreement to sell) made no immediate change in the ownership of the thing sold. As long as it remained in the hands of the seller, it continued to be his property. It was only when the seller fulfilled his engagement by the tradition of the thing, its delivery to the buyer, that the latter became owner. In other words, the ownership passed with the possession. But suppose that the thing was injured, or destroyed, or stolen, before it came into the possession of the buyer, on whom must the loss fall? You would probably say at once, on the seller. The law threw it in many cases on the buyer. The governing principle was this, that if one party did every thing in his power to fulfil the contract, he was entitled to claim fulfilment from the other. If the injury was due to any *dolus* or *culpa* (any fraud or negligence) of the seller, it could not be said that he had done all in his power to carry out the engagement: the loss must fall upon him. But if it was brought about by unavoidable accident or violence, if it was the result of causes which he could not foresee or prevent, then he had done his best, he had done all that could be required of him: he was entitled to claim fulfilment of the other party, to demand the payment agreed on from the buyer. If, however, it was a fungible thing—as a bushel of wheat or a barrel of wine—

that he agreed to sell, the loss, even if wholly unavoidable, fell upon the seller. The contract in this case did not relate to the particular grains of wheat or drops of wine that chanced to be in his possession. It related to certain kinds and quantities of things, which he could still obtain from other sources, and was bound to obtain so as to fulfil his engagement. There were cases in which a thing passed by delivery into the possession of the buyer, without thereby passing into his ownership. If the seller himself was not owner, if his title was a defective one, the title of the buyer must be defective also. Suppose that Titius, having bought a horse from Aulus, and having kept it for a time in his possession, finds that it had been stolen, not perhaps by Aulus himself, but by somebody else, from a former owner. If Aulus, when he sold the animal, acted in bad faith, knowing that it was stolen, he was liable to an immediate prosecution by Titius, who could recover, not simply what he paid for the horse, but whatever value from any special circumstances the horse might have for him. But if Aulus had acted in good faith, believing the animal to be his, then Titius, so long as his own possession was undisturbed, had no ground of complaint against Aulus. The latter, being personally free from blame, could not justly be required to remedy a merely apprehended evil, a liability to inconvenience which might never actually be felt. But if the real owner brought an action against Titius, if Titius suf-

fered an eviction (as it was called), a loss of possession by legal process, then he could fall back upon Aulus as seller, and Aulus of course had a similar right against the person from whom he derived possession. Again, if the buyer needed to be secured from a defective title, he might equally need to be secured from a defective article. And this security the law accorded to him. The general principle was, that the seller guaranteed the thing sold, unless he expressly refused to do so. He was not responsible, indeed, for obvious defects, which the buyer might have seen, and ought to have seen, when he was making the purchase. But for other defects the seller was responsible, even if he was not aware of them himself. The buyer was entitled to have an article as good as he supposed, and might reasonably suppose, that he was getting when he bought. If he failed of this, and the defects were so great as to make the article practically worthless for him, he could claim the annulment of the bargain. If the defects were less serious, he could insist on a diminution of the price, or, if he had paid, on the return to him of part of the purchase-money.

Second, *locatio conductio* (letting and hiring). Here the *locator* (the letter) agreed to put a piece of his own property into the hands of the other party, the *conductor* (or hirer), to be used by him; and in return for this use the conductor agreed to pay a definite amount of money to the locator. In the commodatum

also, the receiver obtained the use of what came to him; but he obtained it as a gratuity, while the conductor had to pay for it. As regards a money payment, the transaction resembled the *emptio venditio;* but, unlike the buyer, the conductor (or hirer) did not obtain the ownership of what came to him. Strictly speaking, he did not even obtain possession; the thing came into his hands, and he exercised a possession over it, but it was the locator's possession, not his own. If wrongfully dispossessed, he could not bring a prosecution in his own name against the wrong-doer, on the ground that any right of his had been infringed. He could only fall back upon the locator, insisting that he should secure for him the use promised in the contract, or pay him damages for the loss of it. If the wrongful dispossessor was prosecuted at all, it must be in the name of the locator, who still remained in law the rightful possessor. I have spoken of a wrongful dispossessor; but the dispossession might be a rightful one. There was nothing to prevent the locator from selling the property at any time. He would of course be liable to the conductor for breach of contract; but this made no difference in the validity of the sale: the buyer might enter at once upon the property, turning out the conductor from a possession to which he had now no legal right. It was usual, however, to prevent such hardship by making it a condition in the contract of sale that the buyer should maintain the exist-

ing *locatio;* the *locatio* should still continue, but with the buyer as locator in place of the seller. An important variety of the *locatio conductio* was the hiring of labor. Instead of a house or a horse, a workman might give his own body, his physical powers, to be used by one who agreed to pay him for the use. To this head was referred, not only what we are wont to speak of as hired service, but also the job-work of artisans. If Titius, being a jeweller, received gold from Aulus, which, for a payment agreed on between them, he was to fashion into a ring, this was a *locatio operis* (letting of work). If, however, the material, the gold, was furnished by the jeweller, the contract was not regarded as one of letting and hiring, but as one of buying and selling: Aulus in that case bought the ring from Titius.

Third, *societas* (or partnership). This was an agreement between two or more persons, whereby they engaged that such and such property, specified in the transaction, should be held by them in common, and used for their common gain and profit. This last idea, of a lucrative use, as the aim of the *societas*, was an essential element in the contract. Without it there might be a *communio bonorum*, a joint ownership of undivided property, such as often arose without any contract, by gift, or legacy, or inheritance, etc.; but there could not be a *societas* in the law-sense of the term. For this lucrative use the *socii* (or partners)

might agree to have all their property, with all their acquisitions and liabilities, in common: that was a *societas totorum bonorum.* Or they might contribute only certain parts of their property to the common stock; and they might limit their common operations to some particular kind or kinds of business; that was a *societas alicujus negotiationis.* The contributions of the parties to the common stock might be very unequal: it might even be that a party contributed nothing, the others being perhaps induced to receive him by the expectation of valuable services. But whatever the ratio of their contributions, it was always assumed in law, unless otherwise expressed in the contract, that the parties were all equally interested in the *societas*, all entitled to equal shares in its gains if it was successful, or bound to equal shares in its losses if it was unsuccessful. Yet by express statement in the contract, any proportions of gain or loss might be established among the parties. Thus, it might be arranged that one party should have three-fourths of the gain, but only one-fourth of the loss; or even that one should have three-fourths of the gain, but none of the loss. But an arrangement by which one party should have *all* the gain was not recognized as binding; it was considered as contrary to the nature and purposes of the *societas*, the aim of which was gain for all the parties concerned. Such an arrangement the lawyers called *societas leonina*, a partnership like that which

the lion in the fable imposed upon the cow, the sheep, and the she-goat, his associates in the chase.

Fourth, *mandatum* (commission). This was an agreement by which one party engaged to fulfil without compensation some mandate or order given to him by the other party. I say, "without compensation." It will be understood, of course, that the giver of the mandate could make any return he pleased for the service rendered him. He might even bind himself in other ways, as by a formal stipulation, to make some return. But he could not bind himself to this in the contract of mandate; or rather the contract, if it contained such an engagement, was a mandate no longer: it might be a case of *locatio conductio* (a case of hired labor), or it might be one of those real contracts without special name which became binding only by the fulfilment of one party. The mandatary (as he was called), the receiver of the order, was bound of course to execute the service which he promised; and on the other hand, the *mandator* (the giver of the order) was bound to pay all expenses necessarily and properly incurred by the mandatary in the discharge of his trust. The mandate was employed among the Romans for a great variety of business purposes. In law-proceedings especially its employment was very extensive. If Aulus had a suit at law, whether as plaintiff or defendant, and was unable to conduct it in person, from necessary absence, or pressure of occupation, or lack

of legal knowledge, or from any other cause, he could give Titius a mandate to conduct the case as *procurator:* security was then offered to the court that Aulus would accept and ratify the acts of his procurator Titius. And Titius might also be appointed by mandate *procurator in rem suam* (manager for his own interest); and by accepting such appointment he made the case his own, with all its chances of gain or loss. If Aulus had a claim against Seius, even though he had never brought it to a prosecution, he could transfer it to Titius by a mandate of this kind, appointing him *procurator in rem suam;* and Titius then had all the same rights and liabilities in the matter that Aulus had had before. If Aulus had obtained by stipulation from Seius the promise of a hundred aurei, he could by such a mandate transfer or cede the obligation, make it over to Titius, so that practically Titius instead of Aulus should become creditor by the stipulation. This, in fact, was the process already alluded to, as the one oftenest used for escaping the difficulty, which the requirement of personal presence in stipulations occasioned in business affairs.

The most important obligations have now been enumerated and described. The few which remain must be taken up in the next lecture, after which we shall attend to the general nature of obligations, and to some special classes which need to be distinguished among them.

LECTURE X.

LAW OF OBLIGATIONS (CONTINUED).

As in the four consensual contracts the mere agreement of parties created a perfect obligation, so also it did in *pacta adjecta*, subordinate agreements annexed to any binding contract (never to stipulation or mutuum); so also in *constitutum*, agreement to fulfil a previous (even imperfect) obligation.

Obligations *quasi ex contractu* arose from various causes, as guardianship; joint ownership of undivided property; *solutio indebiti* (payment of a mistakenly supposed debt); *negotiorum gestio* (service rendered in a sudden emergency, which forbade waiting for a mandate), etc.

Obligations from DELICT. Besides the punishment of his crime, the wrong-doer was liable to the injured party in damages, which might exceed the amount of injury, and thus be a *poena* (private-law penalty).—(*a*) *Furtum:* the thief must restore the property stolen or an equivalent, and pay as *poena* its quadruple or double value, according as the *furtum* was *manifestum* or *nec manifestum* (reason for the difference).—(*b*) *Rapina:* the robber must pay fourfold, which included the value of the property taken and a threefold *poena*.—(*c*) *Damnum injuria datum* (wrongful injury to property): the offender, by the *Lex Aquilia*, must pay the highest price which the injured property would have brought within thirty days before the act; or if a slave was killed, or a domestic quadruped, the highest within twelve months before. Same liability for culpable carelessness as for design.—(*d*) *Injuria* (outrage to one's person) might consist in violence (to man himself or members of his household), or in slander, or in mere insult. Roman sensitiveness to ridicule.

Master liable, by *actio noxalis*, for delict of slave: might escape by giving up slave. Compare *actio de pauperie* against owner of vicious animal.—Obligation *quasi ex delicto*, on a *judex* for unjust decision, etc.

General Principles.—The obligation was a *personal* relation between two parties, a *debtor* bound to render some service, a *creditor* to receive it (though in some contracts, especially the consensual, there were mutual services). The debt was a binding (*obligatio*), the payment a releasing (*solutio*), of the person. The creditor's hold was on the person (only later on the property) of his debtor. The *nexum* of early Roman law was in form a conditional sale by the debtor of his own person, which thus became liable to summary and severe treatment by the creditor.

The service required by the obligation did not encroach far on individual freedom, as it related to only one, or at most a few definite acts; and was thus unlike the extensive and undefined service due from son to father, wife to husband, citizen to state.—It must have a money value, making larger the creditor's estate. But some valuable services it seemed wrong to degrade by putting a price on them. Hence a promise of professional services was not enforceable as an obligation; so too in Roman (not Latin) law, a promise of marriage.

The law recognized an imperfect *obligatio* (*naturalis*), which could not, like the perfect (*civilis*), be enforced by a direct action, but might have force in indirect ways, as ground for a *soluti retentio*, a *constitutum*, a *novatio*, a *pignus*, a *compensatio*. The natural obligations arose in general from transactions which would have created civil ones, but for some defect in form or in legal capacity. Loan contrary to *senatus consultum Macedonianum*.

Civil obligations were divided into those *stricti juris* (stipulation, mutuum, delict obligations), subject to a literal and rigorous construction, and those *bonae fidei* (as most real, and all consensual contracts), in which the judge must consider the aims of the parties and the demands of reason and equity.

Where several debtors bound themselves to one creditor, or several creditors accepted one debtor, there was often a plurality of obligations, each debtor being liable for, each creditor entitled to, his own part merely. But there might be only one obligation, called *correal*, each debtor being liable for the whole, but released if one of them paid, and each creditor entitled to the whole, but satisfied if one was paid. Usually this was created by a common stipulation, but it could arise in any way by which several persons were made to owe an indivisible service.

The four consensual contracts—of buying and selling, letting and hiring, society and mandate—were

the only independent engagements in which the Romans allowed the mere agreement of the parties to create a binding obligation. *Independent* engagements, I say, in contrast to the so-called *pacta adjecta* (or added engagements). If Aulus sold a horse to Titius, or if Titius hired the horse from Aulus, or received the free use of it by commodatum, or if the two by societas agreed to have the horse as common property—in all such cases the parties could add to the contract any special engagements they pleased, as to time of paying, as to manner of using, and any like points: these *pacta adjecta* required no formal ground (in words or things) to make them binding. It was enough that the principal contract was binding; they were looked upon as parts of that principal contract, and so, as sharing in its obligation. But there were two contracts, the *stipulatio* and the *mutuum*, which were never allowed to give support and effect to such *pacta adjecta*. These two were so formal and definite in their character that it seemed an incongruity to suffer them to be limited or modified by any mere understanding of the parties. Different from the *pacta adjecta* was the so-called *constitutum*, or agreement to fulfil some previously incurred obligation. Such an agreement, however informal, was always binding: the preëxisting obligation was a sufficient basis for it. The preëxisting obligation might be an imperfect one: it might be nothing more than the natural obligation

arising from the mere agreement of the parties. Though in such a case the law would not enforce the first agreement, the second one, founded upon that, recognizing and confirming it, seemed to have a stronger claim, and could be enforced by process of law.

The obligations thus far described have all arisen from a contract or covenant made with consenting will between the two parties. There was another class of obligations, to be looked at presently, which had their origin in a *delictum* (a delict or delinquency), a wrong, unlawful act done by one party to the other. The Roman jurists divided obligations into those arising from contract and those arising from delict. But in doing so they found that there were some obligations which could not properly be referred to either head. The guardian, who had to administer the estate of an infant, came of course under obligations to his ward; obligations which did not arise from any contract between them, for the child had no option in the matter; and just as little from any delict or wrong act of the guardian. Such obligations the Romans, having no proper name for the class, spoke of as arising *quasi ex contractu* (as if from a contract): their incidents and effects were the same as if they had arisen from a contract. An obligation of this quasi-contractual kind subsisted between joint owners of undivided property, where they had become such, not by a contract concluded between them, but by gift from a third party,

or by inheritance, or in some similar way. Again, if Aulus by any mistake paid Titius what he did not owe him—and such things could not fail to occur, though doubtless the opposite error, of not paying what one owed, must have been much more common—Titius, even though he had acted in good faith, was under legal obligation to give back what he had received: this was the *solutio indebiti* (payment of something not due, payment of a mistakenly supposed debt), and was another case of quasi-contract. Yet again, if Aulus, living in Rome, had some property or interest in Naples, which through unexpected circumstances was threatened with loss, unless something was immediately done; then if Titius at Naples interposed at once and did what was required, Aulus was brought under obligation to compensate him for any expense which he had necessarily and properly incurred in doing so. Perhaps a house belonging to Aulus had been shaken by an earthquake, and was in immediate danger of falling, when it was propped up and repaired by Titius. Here the *negotiorum gestor* (manager of the business), for so Titius was called in the case supposed, though he had made no contract with Aulus, for whom he acted, was treated just as if he had received a mandate from the latter. Here, then, in the so-called *negotiorum gestio*, we find another case of quasi-contract.

It only remains now to describe, very briefly, the obligations arising from delict. These delicts (or wrong

actions) were, in general, violations of law, and therefore offences against the state; they were crimes, punishable as such by the processes of criminal law, a branch of public law, which does not come within our view in these lectures. But besides his liabilities to the state, the wrong-doer came under private-law obligations to the person wronged. He was, always and of course, bound to repair the damage which he had caused to that person, to make his condition as good as it would have been if the wrong act had not been done. But in many cases he was bound to do more than this. Thus a thief discovered in the act had to restore the thing taken, but he could also be compelled to pay the owner fourfold the value of that thing. This fourfold payment was *poena* (or penalty), a private-law penalty, quite distinct from the public *poena* (or punishment), which the state inflicted for the crime. Where the wrong act was the killing of a horse, the owner could demand the highest price that the horse would have brought within the preceding twelvemonth: it might be much more than the owner could have got for him on the day of the killing, more therefore than a compensation for the actual value destroyed; and all the difference, all that went beyond a simple compensation, was *poena* in this sense of private-law penalty.

There were four kinds of delict obligations, arising from theft, from robbery, from damage to one's prop-

erty, and from outrage to one's person. *Furtum* (or theft) was differently treated, according as it was *manifestum* or *nec manifestum* (according as it was or was not detected while in process of commission). In both, of course, the thief was bound to restore the property stolen. But besides this, the *furtum manifestum* (as we just now saw) was visited with a fourfold penalty, while for the *furtum nec manifestum* the penalty was only twofold. The theft was considered as manifest if detected before its completion; and it was not regarded as complete until the thing taken was conveyed to some place of deposit. If, after he had seized his prey, the thief was found out before leaving the spot where he took it, or before reaching a spot where he could keep it, the case was one of *furtum manifestum*, and subject to the fourfold penalty. Why this distinction was made between the two kinds of theft, why one was visited with a larger penalty than the other, is a curious and perplexing question. It is not easy to see that the guilt of the wrong-doer, or the suffering of the injured party, was greater in one case than in the other. Or if a difference was to be made, plausible reasons might be found for making it in the opposite direction. It might be argued that he who could carry off his booty without being observed must generally be the more crafty and dangerous villain of the two. In explanation of the difficulty, it has been suggested that these private-law penalties were originally designed to

prevent attempts at self-redress; that they were a kind of legal commutation for punishments which the injured party would be disposed to inflict with his own hand on the wrong-doer. Now, against a thief caught *flagrante delicto*, the sudden wrath of one whose property was being carried off before his eyes would prompt him to severer inflictions than he might care for when his anger had time to cool. This natural effect of sudden and strong excitement we may suppose to be allowed for, and represented in the heavier penalty of the *furtum manifestum*. The explanation is ingenious and interesting; and if it is not certain, I have none more certain to offer. Theft might be committed against a person who was not owner of the thing taken: it was enough that he had some valuable right in the thing. In fact, a man might commit theft by taking a piece of his own property. If Aulus, being owner of a horse, had granted the usufruct of it to Titius, and afterward took the horse secretly away from Titius, he could be punished as a thief. His ownership did not justify the act; for it was limited by a right of using and enjoying which belonged to Titius; and, in depriving Titius of this right, he has made himself guilty of theft.

Different from theft, which always implied an attempted concealment, was *rapina* (robbery) committed by open force. The robber also could be made to pay fourfold the value of what he had taken. But when

he had done this, he was not bound, like the author of a *furtum manifestum*, to a further restoration of the thing itself. One-quarter of his fourfold payment was a simple compensation for the injury done; the remaining three-quarters was a penalty, but it was a threefold (not a fourfold) penalty for the offence.

The treatment of damage to one's property (*damnum injuria datum*, damage wrongly given) was regulated by the Aquilian law, a statute earlier than the time of Cicero. In general, the owner of the injured property could demand the highest price it would have brought within thirty days preceding the injury. If, however, the injury consisted in the killing of a slave, a horse, or any domestic quadruped, the owner could demand the highest price it would have brought within the preceding twelvemonths. In either case if the wrong-doer refused to pay, stood trial, and was convicted, his liability was doubled. Whether the injury was done by design, or through culpable carelessness, made no difference in the legal infliction. But what was to be regarded as culpable carelessness depended a good deal on the relations of the parties and the circumstances of the case. Thus, if a soldier practising with the lance in his accustomed place of exercise chanced to hit and kill a passing slave, he was considered without fault; but if the thrower of the lance was anybody but a soldier, or if he was a soldier practising anywhere but in his accustomed place of

exercise, it was considered his duty to see that he injured no one; if he neglected this, it was a culpable negligence, and he was responsible for the consequences.

By *injuria* (or outrage), as the fourth ground of delict obligation, is meant some affronting wrong, calculated to wound the self-respect and touch the honor of the person injured, to humiliate or degrade him in the view of others. It might consist in violence to the person himself, or to some member of his household. But it might be a mere injury to feeling, caused by insulting words or slanderous reports or libellous writings; even an offensive song, a lampoon or pasquinade, might subject the author to this kind of delict obligation. This rigor was seen even in the Code of the Twelve Tables, and the thin-skinnedness which it evinces, the extreme susceptibility to ridicule and censure, was undoubtedly an element of the primitive Roman character. It forms a strange contrast, noticed even by Cicero, with the indulgent toleration of the Athenians for the unbounded personalities of their comic drama. Dr. Arnold has pointed out its unfortunate bearing on the credibility of the early Roman history, to which it has given the character of unmixed and unmeasured eulogy. In the extent to which it was carried, we must regard it as a weakness of the old Romans: but it stands closely connected with some qualities which made them masters of the world, their

high sense of personal dignity and their intense desire of honorable reputation.

For any delict committed by a slave, the master could be made responsible in a prosecution called *actio noxalis* (action for harm). The master might, however, if he chose, relieve himself from responsibility, by forbearing to defend the suit, and at the same time giving over the offending slave into the ownership of the injured party. It is curious that a similar action at law (the *actio de pauperie*) lay against the owner of a vicious and ungovernable beast for any mischief done by it, and that here too the owner might escape responsibility by a surrender of the mischievous animal.

There were some few cases of quasi-delict obligation (obligation *as if* from delict): thus, where a judge by a wrong decision (the result of fraud or culpable negligence) made himself accountable in damages to the injured party; the case where the owner or tenant of a house was held responsible for injury done by others in throwing or pouring things from the windows or roof of the building; and one or two other cases which may be passed over without special description.

Having thus gone through with the obligations, one by one, making some slight acquaintance with each as we passed it, we are prepared to notice certain common features which belong to the whole class or to large portions of it. The term obligation, in this

use, may be defined as a relation between two persons by which one has a legal right to some valuable service of giving or doing to be rendered by the other. The persons who stand in this relation are called creditor and debtor, he who is to render the service being called debtor, he who is to receive it creditor. This complete antagonism of the parties, in which one has only to render a service, the other only to receive it, may be regarded as the normal character of an obligation. It is most distinct in the *stipulatio*, in the *mutuum*, and in all the obligations arising from delict. It is less absolute in the *commodatum*, the *depositum*, the *mandatum*, and some others; for, while the creditor under these contracts has in general only to receive something, circumstances may arise in which he will be required to do something for his debtor. And some obligations are in their nature reciprocal: they always involve the necessity of mutual services. In buying and selling, if the buyer is bound to pay the price, the seller is no less bound to deliver the article. The same is evidently true of letting and hiring; while in *societas* (or partnership) this two-sided reciprocity of service appears in the fullest extent.

The obligation, it was said, is a relation between one person and another. In property, one person stands opposed as owner to all the world besides. He has a claim upon all persons alike, though for a negative service only, a non-action, a non-interference with

his absolute control over the object. But the claim of the creditor for the service of his debtor is an individual one. It may pass after the decease of the debtor to his heir, who represents and continues his legal personality; but it does not extend to other persons, unless they have assumed it by distinct acts of their own. This feature of the obligations was very sharp and prominent in the view of the Romans. The hold of the creditor was on the person of the debtor. The obligation of a debt was a tying up or binding, or bondage of the person: the payment was a *solutio*, a loosing or release of the person from that bondage. The property of the debtor was not a pledge for the debt. It could be made so by special agreement, though in the earliest law only by transferring it at once to the ownership of the creditor. Without such special agreement, the creditor whose debtor failed to pay could not touch his property. Even when the debtor had been prosecuted and condemned to pay, if he still failed, the creditor could not touch his property. He could seize his person—I speak now of the early law, in the first centuries of the republic—and after holding him in rigorous confinement for sixty days, with opportunities, however, either to pay himself or get somebody to pay for him, if payment still failed, he could sell him as a slave, or put him to death; if there were several creditors, they could cut his body into pieces and divide it among them. This extreme

severity was afterward softened; but the principle remained long unchanged that the hold of the creditor was on the person of his debtor. If the debtor obstinately and to the last refused to surrender his property, the creditor could not touch it. You have all heard of the *nexum*, as a means by which patrician capitalists in the early times of the republic oppressed the impoverished plebeians who were constrained to borrow money from them. This *nexum* was simply a transaction by which the creditor was authorized, in case of non-payment, to treat the debtor as if he had been prosecuted in court and condemned to pay the amount of his debt. It put the non-paying debtor at once and without trial in the position of a *damnatus* (a condemned person). What I wish to point out now is the form of the *nexum*: it was the same as the form of the *mancipium* (or mancipation), with the brazen scales, the balance-holder, and the five witnesses: the lender touched the scales with a piece of brass and handed it to the borrower. It was a sale; the piece of brass was a symbol of the price, that is, the money lent; and the object purchased with it was the person of the debtor. It was in form a conditional sale by the debtor of his own person, giving it into the ownership of the creditor, unless released by the repayment of the loan. It is highly important to understand this conception, so distinctly and vividly held by the Roman mind, of the natural relation between debtor and creditor.

The person who incurs an obligation loses part of his natural freedom. However free he may be in other respects, there is one act which he is no longer at liberty to refuse, one act which he is under a legal necessity of doing. I say "*one* act," for usually there is but one in the obligation. Often, indeed, there are more: the obligation may comprise a whole series of actions, as where a man binds himself to pay a hundred aurei a year, for ten years to come, or where two men unite with each other in a business partnership (a *societas*) of greater or less extent. Yet even in such cases the required activity is of a definite and limited character; it is confined to certain points, to particular matters, understood in advance, and it does not admit of further extension. In this respect the obligations with which we are now occupied distinguish themselves broadly from those obligatory relations which arise out of the nature of family and society. The obligation of a son to his father, of a wife to her husband, of a citizen to the government under which he lives—these are large and vague relations, extending to a great variety of acts, and unsusceptible of precise definition. It is a serious mistake to confound them with the obligations now under discussion. To a great extent they are extra-legal, existing under the sanctions of religion and morality, but not of human law. Where they are invested with legal sanctions, they do not come under this law of obligations, but belong to public law or to

family law: under this last head we have already considered some of them. The obligations of marriage arise out of a contract; but that contract is a very different thing from a stipulation, a loan, a sale, or even a partnership, as described in the last lecture. Nor does it matter if the marriage ceremony takes any of these forms. The Roman marriage by *coemptio*, we saw, was a formal sale of the bride to her future husband. But the sale had only a formal character; its effects were wholly different from those of a real sale, as different as the positions of the Roman matron, and of the slave-woman purchased for her service. The attempt sometimes made to apply to the marriage relation analogies drawn from business contracts, grows out of a confusion of ideas. Its effect (so far as it has any) must be to degrade and demoralize that which it seeks to explain.

The points thus far emphasized in the nature of an obligation are—that it subsists between two parties, a debtor and a creditor; that it binds the person of the debtor, not his property; and that the service imposed by it is of a particular and limited character. There is still another point which needs to be brought out more distinctly. The service to be rendered must be a valuable one. It must be calculated to advance the property interests of the creditor, to maintain or increase the total of his estate. This feature of the obligation separates it widely from the family relations,

and brings it into a natural and close connection with the rights of property. It must have a property value, a value which could be estimated and expressed in money. If the service merely affected the feelings of a person without affecting his property, it could not be the object of an obligation. If Titius promised to salute Aulus wherever he met him, or to praise the military talents of Aulus, or to receive as guest a friend of Aulus, and the like, the promise was not binding in law, not even if it was put into the form of a stipulation. There were cases, however, in which the service rendered was a valuable one, in which nevertheless it seemed to the Romans an incongruity and degradation to treat it as having a price or as being a mere matter of traffic. This was the case where mental gifts of a high order were required; thus, with intellectual and professional services, those of an author, a physician, a counsellor-at-law, an arbiter, a land-surveyor (this last being a business which demanded higher abilities and more of scientific training then than now). Such services, the Romans felt, must not be treated like those of a mechanic or an agricultural laborer. The compensation for them was not looked upon as price or hire, but as an *honorarium*, an honorary acknowledgment of respect and gratitude. The promise to render such services, even if made in the form of a stipulation, could not be enforced as an obligatory contract; if a legal hold upon the promiser was con-

sidered as necessary, he must engage to pay a certain sum as penalty in case the service should not be rendered: this conditional promise to pay seemed to the Romans unobjectionable, and was enforced without hesitation. The Romans had a similar feeling in reference to the betrothal engagement, the promise of a future marriage. They seem to have differed in this respect from their neighbors of the old Latin cities. By the early Latin law the promise of a father to give his daughter in marriage, and the promise of the intending husband to take her as wife, was treated as an obligatory contract, and in case of non-fulfilment, the party in fault was condemned to pay the other a sum of money, an equivalent for the estimated injury. But the Romans, while in the ceremony of espousals they used the form of a stipulation, refused to hold it binding in law and enforce it with money-damages. Perhaps it was not so much the seeming degradation of marriage by setting a price upon it, that influenced their minds; but rather the apparent incongruity of using force to bring about what ought to be a purely voluntary relation. And in this case they would not allow the promiser to bind himself in the way just described. The promise to pay a certain sum as penalty if one should fail to carry out the espousal engagement, was treated as simply invalid. It will be understood that I am not passing any judgment on the Roman law as to promise of professional services and

promise of marriage; my object is only to represent it and account for it. I have no disposition to challenge the justice or propriety of the different treatment which such promises receive from our own law.

It is important to notice here a distinction recognized in the Roman law between civil and natural obligations. If Titius by a formal stipulation promised to pay Aulus five hundred aurei, this was a full *civilis obligatio:* in case of non-payment, Aulus could bring an action, a suit, against Titius, and compel him to pay. But if Titius simply agreed by an informal promise to pay the five hundred aurei, his case was very different. We have said more than once that such mere agreement did not generally create an obligation. In saying this we had in mind a perfect civil obligation, which could be enforced by an action or suit at law. We must now qualify the statement: an agreement of this kind was sufficient to create an imperfect obligation, a *naturalis obligatio*, which might give rise to legal effects. These effects, though much more limited than those of the *civilis obligatio*, are not without interest and importance. Thus, if Titius had paid the sum informally promised, and afterward sought to reclaim it, as something which he never owed, he was not allowed to do so: he had really owed it, though the obligation was an imperfect one, an *obligatio naturalis*. Aulus could not have enforced payment; but, when payment was made, he could not be called on to

refund; he had the *soluti retentio* (the right of keeping what was paid). Or if Titius confirmed his first engagement by another to the same effect, or if with the consent of Aulus he substituted a new engagement (say, with Maevius as creditor) in place of the first, both these transactions were valid. The former (as we have seen) was called *constitutum*, the confirmation of the previous engagement; the latter was called *novatio*, the substitution of a new engagement for the previous one; and both these in the case supposed would have full binding force, because there was an obligation, a natural obligation, in the previous engagement. If that had been a promise to salute Aulus or to praise his military talents, or any thing else which was wholly invalid, neither the constitutum nor the novation would have been of any avail. Again, if Titius gave a pledge (*pignus*), or if he offered personal security for the promised payment, then if payment failed, the pledge would be forfeited, the surety would be liable: the natural obligation was sufficient for these effects, to hold the pledge and to bind the surety. And yet again, if Titius on any ground brought a suit against Aulus, say for a thousand aurei, Aulus could ask the court to deduct the five hundred which Titius had promised him: such a *compensatio* (as it was called), such a balancing or offsetting of opposite claims, required only a natural obligation. We see, then, that a natural obligation was one in which the

creditor was refused a direct action, but allowed every other means (every indirect and occasional means) for obtaining the recognition and satisfaction of his claim. It must not be supposed that every just and reasonable claim—for instance, that of a benefactor on the gratitude of the person benefited—would constitute a natural obligation, in this law-sense of the term. In general, these natural obligations arose out of transactions which would have constituted a perfect civil obligation, but for some defect either in the form of the transaction or in the capacity of a party to it. In the case just supposed, it was a defect of form, a mere promise, when a stipulation was required. But if Titius was a ward acting without authority of his guardian, his promise, even if made by stipulation, gave rise only to a natural obligation: the defect here was not in form, but in capacity for legal action. So, if Titius was a slave acting without his master's authority, he could not in that case lay the master under obligation; he could only bring a natural obligation on himself, and even this could never manifest its effects unless he was afterward manumitted and became a freeman. If Titius, being a son under his father's power, obtained a loan without his father's approbation, the lender could not enforce payment: the act was contrary to a special statute, the *Senatus consultum Macedonianum*, occasioned (it is said) by an unnatural son murdering his father, that he might gain the inheri-

tance and pay off his debts to the usurers. Yet the son, who had contracted such a loan and could never be sued for it by a direct action, was subject to a natural obligation for its payment.

Among the civil obligations, enforceable by suits at law, we find a division into *obligationes stricti juris* and *bonae fidei* (obligations of strict law and of good faith). To the former class (those of strict law) belonged the stipulation and the mutuum. Here the object of the engagement was distinctly marked in the form of the business; and the debtor was held to the exact tenor of his engagement. It might be hard for him, harder through unforeseen circumstances than he had reason to expect when he incurred the obligation. The court in acting on the case could not pay much regard to such considerations: it must apply a strict construction to the terms of the contract. The delict obligations also were *stricti juris.* The wrong-doer must abide the full legal consequences of his action. However hard they might be, he had no claim for relief. The penalties prescribed by law—I am speaking of private-law penalties—must be applied to him in all their rigor. But most of the real contracts and all the consensual were *bonae fidei* (obligations of good faith). In these, there were, or at least there might be, reciprocal services and duties. Thus, in buying and selling both parties had something to do as well as something to claim. And these services and duties

were often of such a nature that they could not be distinctly foreseen or explicitly provided for in the contract. They must depend in part on custom, in part on tacit understandings, above all on the obvious requirements of fair and honorable dealing, that is, on *bona fides*. This *bona fides*, this subjection to equity and reason, was an actual element in such contracts; it was binding on the parties themselves, and must be considered by the court in dealing with the transaction. The contract must be enforced, indeed, but not in slavish adhesion to its letter; rather, according to its spirit and intent; enforced with careful regard to the interests of both parties; so enforced that both might as far as possible realize any just advantage they had aimed at by it. From this treatment of the contract by the court, both creditor and debtor, both plaintiff and defendant, might derive advantage. But the balance of advantage, no doubt, lay on the side of the debtor or defendant: he could bring into the case a variety of modifying and mitigating circumstances which would be excluded by an obligation of strict law. It must be observed, however, that the creditor always had it in his power, when the bargain was made, to guard himself against detriment from this cause. He might reduce his claim to the form of a stipulation: even if it arose from a commodatum, a depositum, a sale, a purchase, or any other transaction, he might put his claim into this form, and thus secure

all advantages which the stricter obligation could give him.

There is one class of obligations which calls for some special exposition—the obligations in which there was more than one creditor or more than one debtor. If Aulus, addressing Titius and Seius, said, *Spondetis mihi, Titi et Sei, centum aureos dare?* (Do you, Titius and Seius, engage to give me a hundred aurei?), and they each answered, *Spondeo*, the result was, an obligation for a hundred aurei, with one creditor, Aulus, and two debtors, Titius and Seius. By this engagement each debtor owed half, and only half, of the sum named: Aulus could demand only fifty of Titius and only fifty of Seius. The seemingly single obligation for a hundred aurei was in fact an aggregate of two separate obligations for fifty: there were really two debts, owed to the same person, yet essentially distinct from each other. So, too, if Aulus, addressing Titius, said, *Spondesne, Titi, mihi et Maevio centum aureos dare?* (Do you engage to give Maevius and me a hundred aurei?), and the answer was, *Spondeo*, there was an obligation with one debtor, Titius, and two creditors, Aulus and Maevius. But each creditor could only demand fifty from the common debtor; there were really two debts owed by the same person, yet essentially distinct from each other. It was possible, however, for the parties, if they wished it, and expressed their wish with the proper distinctness, to bring about a very different re-

lation. If Aulus, having first obtained from Titius the promise of a hundred aurei, turned to Seius and said, *Spondesne mihi, Sei, eosdem centum aureos dare?* (Do you engage, Seius, to give me the same one hundred aurei?), then if Seius answered, *Spondeo*, there was one single obligation for a hundred aurei, binding in full on each of the two debtors. Aulus could demand a hundred from Titius or a hundred from Seius, and in case of non-payment could sue either one, taking his choice between them, for the full amount. If either paid the hundred, whether willingly or by compulsion, the other was released: for there was but one debt, and that was now discharged. This kind of obligation is called correal obligation (correal, from *con*, and *reus* or *rei*, connected parties, parties associated in a common debt or credit). It might equally subsist with two or more creditors. Thus if Titius, after promising a hundred aurei to Aulus, promised the same hundred aurei to Maevius, either creditor, Aulus or Maevius, could demand the whole hundred from Titius; but when he had paid to one, the entire debt was discharged, there remained no obligation to the other. I have spoken of two persons, but there might be any number of debtors, each liable for the whole amount, yet released as soon as any one had paid; or any number of creditors, each entitled to claim the whole amount, yet losing all claim as soon as one of them was paid. Correal obligations with two or more debt-

ors were very common: they were intended as a security for the creditor, who in case of non-payment could sue any one of the debtors, and would of course choose the one who seemed best able to pay. Correal obligations with two or more creditors were much less frequent: they were designed to meet a difficulty in the collection of debts; if circumstances made it inconvenient for one creditor to collect the debt by suit or otherwise, it might be easy for another to conduct the business and obtain the money.

If two or three persons joined in committing a delict (for instance, a theft of the less flagrant kind), each one was liable for the penalty; and this, as we have seen, was the double value of the thing stolen. But there was no correal obligation here: the payment by one did not release the others: the penalty might be collected as many times over as there were persons associated in the crime. It was otherwise with the claim for compensation of damages; the injured party could claim full compensation from any one of the associates, but, when once compensated, he could of course claim nothing more on this ground. This, therefore, might seem to be a case of correal obligation; but it was not so considered. Each associate in the crime was liable for his own act; each had his obligation separate and distinct from the rest; and it was only a kind of accident, at least it did not change the nature of the relation, that ful-

filment made by one superseded all fulfilment by the others.

But there was a case in which a relation essentially the same as the correal might be established without being explicitly declared, or even aimed at, by the parties. Suppose that Titius by stipulation had promised Aulus that he would give him his slave Pamphilus, but before fulfilling the promise died, leaving two heirs of his estate. The obligation imposed by the contract would fall with equal weight upon the two. The fulfilment, if it were divisible, would have to be divided between them. The slave might indeed be divided and given in parts: this would be physically possible, but it would be no fulfilment of the contract. The division would change the nature and uses of the thing promised. The two halves of a dead slave would not be equivalent to the whole of a living one. What was to be done under these circumstances? The answer of the Roman law was that one of the two heirs must make the complete fulfilment. Aulus might demand the slave from either one according to his pleasure: if he failed to comply, Aulus might sue him and obtain the slave himself or his full value. And when the claim of Aulus had been satisfied by one of the two, the other was released from obligation—that is, from the obligation to Aulus: to his fellow-heir he was bound, by rule of law, to share in the burden of his fulfilment, to pay him half the estimated value of

the slave. The same would be true if Titius had promised to make a house for Aulus. A house, like a slave, was an indivisible object: it could not be divided without an essential change in its nature and uses. If you take a house to pieces, the pieces are not quarters of a house, or tenths, or hundredths; they are fragments, not fractions; boards and bricks and stones, building-materials, things essentially different from a house. Aulus, therefore, would demand the whole service, the whole making of the house, from one of the two heirs of Titius; and this one could then look to his fellow-heir for half the estimated cost of the edifice. The general principle was, that where two or more persons owed an indivisible service they stood in a correal relation to each other: each one was liable for the whole service, and by his fulfilment discharged the obligation for the rest; but these could be compelled to pay him their money shares of the value of his service.

I am afraid that the details given in this lecture and the last may have seemed to you unimportant and tedious. But I hope they will have contributed toward two objects, neither of which may be without value: to make you acquainted with the circle of business transactions and relations in the ancient Roman world; and to illustrate the modes of conception and reasoning among the jurists to whom we owe the scientific construction of the Roman law.

LECTURE XI.

LAW OF INHERITANCE.

The interests of property required that one's estate (aggregate of rights and obligations) should not perish with him, but live on under a successor (*heres*) designated in his testament, or by law if he died intestate.

General Principles of inheritance: 1. It was a universal succession (though family rights, and some others strictly personal, were not included in it). 2. It could not be partly testamentary, partly intestate. The testament either created a universal successor, or it had no effect at all. 3. The testamentary heir took the inheritance with obligation to pay the legacies ordered in the will. 4. The estates of the deceased and the heir were blended into one; whence—5. The heir was liable in his whole property for the debts of the inheritance; though by the *beneficium inventarii*, under Justinian, the liability might be restricted to the assets of the inheritance. 6. There were certain *necessarii heredes*, who, when appointed heirs by testament or law, could not refuse; such were the *sui heredes* (descendants under *potestas;* to whom, however, the prætor allowed a *jus abstentionis*), and slaves of deceased, made free and heirs by testament (often to bear *infamia* of expected bankruptcy). 7. The inheritance might be divided among several heirs, but only in fractional parts of the whole, the fractions being equal, unless otherwise ordered by testament.

Intestate Inheritance often came in where a testament had been made, this being invalid from the first, or rendered inoperative afterward (as by subsequent incapacity or death or refusal of the appointed heir,

by failure of a prescribed condition, etc.). The intestate heir was the person entitled by law at testator's death, or, if failure of the testament was not then certain, at the time when it became so. But no one born (conceived) after another's death could be his heir.

The early law of inheritance disregarded cognation (blood-relation; lineal or collateral; the degrees determined by number of steps, up, down, or both ways, necessary in tracing connection), and considered agnates only (Lecture VI). It offered inheritance—1. To *sui heredes:* sons and daughters under *potestas* shared equally; children of a deceased son were admitted to his share. If no *sui*, then—2. To nearest collateral agnate (or agnates, when there were several in the same degree). Father and mother of deceased, why excluded; mother in stricter marriage could succeed, but only as sister. If nearest agnate refused, then (not to remoter agnates, but)—3. To the *gens*, group of connected families, with common gentile name: succession of the *gens* very imperfectly understood.

Gradual changes of this system, all in the interest of cognates. First, the prætors allowed emancipated children to succeed (as *bonorum possessores;* compare Lecture IV.) along with *sui heredes;* but not until the former had added their own acquisitions to property of deceased (*collatio bonorum*). Again, on failure of descendants and nearest agnates, the prætors, setting aside the *gens*, called in the cognates, one degree after another, until a *bonorum possessor* was found, but not going beyond the sixth degree. A *senatus consultum Orphitianum* (178 A. D.) gave the mother's estate to her surviving children as heirs (children of a deceased child being excluded until two hundred years later). And a *senatus consultum Tertullianum* (158 A. D.) allowed the mother (in freer marriage) to precede the nearest collateral agnates, unless these were brothers and sisters (if there were sisters only, she shared with them); but the privilege was confined to mothers (with *jus trium liberorum*) who had borne children three times, or (if freedwomen) four times.

Other changes in the same direction were made by Justinian, who at length in Novel 118 introduced a new system, founded on cognation. He arranged all cognates in four successive classes of heirs: 1. All descendants, of both sexes: sons and daughters sharing equally; children of a deceased descendant take the share that would have come to their lost parent. 2. Ascendants, with full brothers and sisters: all sharing equally; children of deceased brother or sister taking their parent's share; if there were only ascendants, those on father's and mother's side each take half. 3. Half brothers and sisters, with children of deceased ones:

sharing as in Number 2. 4. Other cognates of all degrees, the nearer degree excluding the remoter, those of the same degree sharing equally. No preference of male sex or elder birth. Difference between this system and the old Germanic one of successive stocks (of deceased, of his father, of his father's father, etc.), with unlimited right of representation, as seen in English inheritance of lands.

In the last four lectures we have considered the elements which make up the estate. What we call the estate is an aggregate of rights and obligations vested in the person of the owner—rights of property, rights in the property of others, rights to particular services from others with obligation on their part to render them, obligations on his part to render such services to others who have a right to demand them. We have now to ask, What becomes of this estate, this complex of rights and obligations, when the person in whom they were vested had ceased to exist? Do they perish with him? Is his property left without owner, to become the property of any one who first takes it for his own? Are his debtors relieved from all the payments or other services which they were bound to render him? Are his creditors debarred from all hope of obtaining those which they were entitled to claim of him? Under such a state of things, civilization would hardly be possible. The interests of property require, above all things, stability and security. They need to be guarded from the ever-recurring shocks, the perpetual agitation and uncertainty, which death would cause, if it were the dissolution of property as well as

of life. From this necessity came the principle of inheritance, the principle (that is) of the permanence of estates. The living subject of the estate, the owner, passes away, but the estate itself lives on under another owner. What is said of the king, the great lord of the land, that he never dies, may be said in like sense of every landlord, every property-holder, nay, every bankrupt, whose debts exceed his means of paying them. The legal personality of the first owner is not extinguished at his death; it reappears with full force in his successor. This principle was apprehended and applied with great sharpness by the Romans from the earliest times. Every owner of an estate must have an heir, who followed him in the estate, with relations and capacities similar to his own. The owner himself was permitted during his life to designate the person whom he wished to have for his successor. The choice must be expressed and witnessed with peculiar formalities, which made it a *testamentum*, an attestation of the maker's will in regard to his heir. If the man himself made no testament, no formal appointment of a successor to his estate, the law interposed after his death, and appointed one from within family connection. The inheritance was said to be testamentary in the former case, and intestate or legal inheritance in the latter.

There are several principles and facts, pertaining to these two kinds of inheritance, which ought to be made prominent at the outset.

First, inheritance is a universal succession. The heir takes the place of his deceased predecessor, reproducing and continuing his legal personality. All the rights of property, all the claims and liabilities which belonged to his predecessor, pass over to the heir, and become his rights, his claims and liabilities. There are, indeed, rights which do not admit of this transfer, being essentially personal in their nature; family rights, in which the element of property, if seen at all, is only secondary; such as the right of a husband to the society and assistance of his wife, or the right of a father to the obedience and service of his children. The obligations which correspond to these rights are equally untransferable; we have already seen that they are not obligations at all, in the restricted legal sense of the term. Even among obligations, strictly so called, there are some of a character so peculiarly personal, that they do not pass to the heir. Thus in a *societas* (or partnership), if one member dies, the heir does not succeed to his position and duties as partner.

Second, inheritance could not, in any particular case, be partly testamentary and partly intestate. If the testament of the deceased had any effect, it constituted some person his heir; and this heir, being universal successor, took the entire estate, so that there was nothing left for intestate inheritance. If the testament did not appoint any person heir, or if from any

cause the person appointed did not actually receive the inheritance, then the testament, having failed to accomplish the one essential object for which it was made, was wholly set aside; any directions it might contain on particular points were disregarded, there being no heir created by the will on whom they could be binding; and the transmission of the estate was determined solely by the rules of intestate inheritance. If the testator said in his will, "Let Aulus be my heir, but let him take only half of my property," or "Let Aulus be my heir, to receive only my lands and houses," or made any similar restriction to prevent the whole estate from devolving on his heir, the law would not enforce the restriction; it ignored the limiting clause, treating it as if unwritten, and gave the whole estate to Aulus. It must not be supposed, however, that no one but the heir could receive any thing by the will; for—

Third, in testamentary inheritance, the full right of the heir was limited by the necessity of paying the legacies. Though the whole estate came into his hands, it came with the obligation of making any particular grants directed in the will. In the old form of making wills, by mancipation, or symbolical sale of the estate, these directions entered in as part of the contract, as conditions of the sale, binding on the heir, who figured as purchaser in that transaction. And through all later changes of form, the same condition

was understood as subsisting: by his acceptance of the estate the heir bound himself to make out of it any grants prescribed in the testament. These grants, or alienations of property, imposed by the testator on his heir, were called legacies. They might amount to the entire value of the estate, so as to make the right of ownership vested in the heir a transient and profitless one. This was the principle of the civil law, and was long maintained in all its strictness; though, as we shall see farther on, it was at length so modified that the heir could always obtain a certain fraction of the value of the estate, if it had any value.

Fourth, in all inheritance, by will or without one, there was a complete fusion between the estates of the deceased and of the heir, the two flowing together into one indistinguishable whole. The person of the deceased lived on in the heir, but not as a personality distinct from the heir's. The latter, after his accession as before it, had only one estate, augmented though it was in its means and liabilities by those of the inheritance. There is an obvious consequence of this doctrine, which on account of its importance may be stated as a separate head.

Fifth, the heir was liable to the full extent of his property for the debts of his predecessor. In discharging those debts he could not stop short when he had paid out all that came to him by the inheritance. He must go on paying out of his own resources, just

as if the debts were of his own contracting. If he was himself a creditor of the deceased, he could not reserve any thing from the assets of the inheritance to pay his own claim. In fact, the claim was extinguished by the fusion of the estates; it was now a debt due by himself to himself, in which he was debtor and creditor at the same time—that is to say, it was no debt at all. You will see that an insolvent inheritance was a negative quantity, an absolute loss, to the heir who accepted it. It might sweep away his whole property and make him a beggar; it might load him with the weight of obligations which he could never hope to discharge. An inheritance known to be insolvent, every one to whom it was offered as heir would, of course, make haste to decline. An inheritance which might be in this condition, no one would be willing to accept until he could satisfy himself in regard to its solvency. That the heir should wish to deliberate and examine before accepting the offered inheritance, and that with or without deliberation he should absolutely decline the inheritance—these were facts of common occurrence, which the law had to recognize and provide for. It should be said, however, that Justinian made a highly important exception to the rule of which we have been speaking. He introduced a method—the *beneficium inventarii* (benefit of inventory), as it was called—by which the heir, who resorted to it, could escape any liability beyond the assets of the inheri-

tance. To this end, he must prepare an inventory of his predecessor's estate, a full and exact statement of all effects and all indebtedness belonging to it. This work he must enter on within thirty days after learning that he was heir, and must finish it within ninety days, or, in exceptional cases, within a year from the same time. The statement must be drawn up in the presence of a notary public, with privilege of attendance for the creditors of the deceased, and other parties interested. The heir who complied with this condition, who presented such an inventory, was not subject to the fusion of estates and the consequences flowing from it, as before described. He was bound to pay the creditors only what he received from the inheritance; and if he had been a creditor himself, his claim was not extinguished: he could assert it with the same right and effect as any other creditor.

Sixth, heirs in general were such only by their own consent; but this was not the case with all. There were some persons who, if appointed heirs, whether by testament or by law, were not at liberty to refuse the inheritance: they were *necessarii heredes* (necessary heirs). Such were the children of the deceased, who had been under his power (his *patria potestas*) while he lived and became independent by his death. He might pass them over in his will, making some one else his heir; but if he gave them the inheritance, or if in default of a will it was offered them by the law,

they could not decline it; they were heirs of their father, whether they wished it or not, from the very moment of his death. It should be said, however, that the prætor mitigated the strictness of this requirement. He conceded to such persons a *jus abstentionis:* they could abstain from all interference with the estate, taking nothing from it, doing nothing to it, exercising no powers or rights of inheritance. They would still be heirs: the law gave them this character, and the prætor could not divest them of it; but he would not allow them to be sued for any claims against the estate, and he thus relieved them from the hazards and burdens of their heirship. A slave, too, when appointed heir by the will of his own master, was a *necessarius heres;* and in his case there was no *jus abstentionis.* For this, the slave must be under the master's power at his death, and receive freedom by direction of his will; according to Justinian, the gift of freedom did not need to be expressed, being understood in the appointment as heir. It was a common thing for a person who thought himself insolvent to take this course, to make one of his own slaves the successor to his estate. Under the Roman law the bankrupt incurred infamy when his effects were sold for the benefit of his creditors. If the effects sold were those of a deceased person whose inheritance no one would accept, the infamy attached to the name of the deceased. But if he had obtained an heir in one

of his own slaves, this heir was the bankrupt whose effects were sold and on whom the infamy fell: from this the slave appointed heir could not escape, but he was more than compensated by receiving his freedom.

Seventh, the character of heir was not necessarily confined to one person; it might be vested in two or more persons, in any number of persons, at the same time. The personality of the deceased was then divided among several successors, who received and shared the aggregate of rights and obligations which belonged to their predecessor at the time of his death. Each in his proportion was the representative of the deceased, so that each one had his proportionate part in all the rights and in all the obligations which he left to his successors. It was not allowed to a testator to say, "Let Aulus and Maevius be my heirs: let Maevius have my house and land, and let Aulus have all the rest of my property;" or, rather, he was allowed to say it, but the law would not enforce it. In such a case, the law would recognize Aulus and Maevius as heirs, and would divide the estate equally between them. If the testator would attain his object, he must draw his will in a different manner: he must appoint Aulus his heir, with express direction to give his house and land as a legacy to Maevius. Aulus then will be sole heir, sole successor and representative of the testator: Maevius will be a mere legatee, receiving a specific benefit from the estate, but without any fur-

ther relation to it. Between heirs, the only division allowed was a fractional division; a man could be heir to the half or third of an estate, to two-fifths, or seven-twelfths, or any other fraction; but he could not be heir to a house, or a farm, or a pair of oxen, or any other particular object. If the testament, while it named several persons as heirs, said nothing as to their proportions in the inheritance, it was presumed to have been the testator's wish that they should share alike; the law admitted them to equal portions of the estate. But it was in the power of the testator to fix any proportions that he pleased; he had only to name them in his will, and the law would see them carried into execution. Even in rectifying his errors, it would seek to carry out his intentions. If he named two heirs, giving to one a half of his estate and to the other a quarter, the law divided the whole estate between them, giving two-thirds to the first and one-third to the second, different fractions from those named in the will, but having the same ratio to each other. If he gave half to one and three-quarters to the other, the law, which could not add a quarter to the worth of the estate, changed these fractions to two-fifths and three-fifths, which have the same ratio as a half and three-quarters. It was a common practice among the Romans for a testator in dividing his inheritance, to look upon it as a pound consisting of twelve ounces, and to say, for example, "Let Aulus, Maevius, and Seius be

my heirs, Aulus in five ounces, Maevius in four, and Seius in three." The estate was then divided into twelfths, the heirs receiving five, four, and three, respectively. If he made Aulus heir in five ounces and Maevius in four, without assigning any number for Seius, Seius would still receive three, that being all that was left of the estate. If he made Aulus heir in five ounces, without assigning any number for Maevius or Seius, these two would share equally in the seven ounces that remained, each taking three and a half twelfths of the estate. But what if, making the same three heirs, he gave Aulus five ounces and Maevius eight, without any number fixed for Seius? He was then supposed to have looked upon his estate as two pounds or twenty-four ounces; in other words, to have divided it into twenty-fourth parts, of which Aulus would have five, Maevius eight, and Seius the remainder, that is, eleven parts. But we need not go at greater length into these details. [It may be well, however, before proceeding further, to recapitulate the points thus far attended to.]

With these principles in mind, we proceed to take up the rules of intestate inheritance. These must, of course, always be applied where the deceased owner of an estate had never made a will. But they had to be applied also in many cases where the deceased had made a will, or had at least tried to make one. Perhaps the will was invalid from the outset. Some for-

mality may have been neglected which the law regarded as indispensable. Or the person appointed heir may have been one to whom the law denied the right of inheriting, an alien (for instance), a person outside the pale of Roman citizenship. Perhaps the will was properly made and was valid at the outset, but afterward, from some cause or other, had lost its force. The person appointed heir, though at the time capable of inheriting, may have come to be incapable at the death of the testator. Or he may have been appointed under some condition which was never fulfilled. Or he may have died before the opportunity of taking the inheritance was opened to him. Or, when the opportunity was offered him, he may have declined to accept it. These are by no means all the cases in which a will, properly made and originally valid, might fail to secure its object, and might thus leave the way open for intestate inheritance. Here, however, we must note a distinction of some practical importance. Let us suppose that Titius was the testator, and that at the moment of his death Aulus was the person who, by the rules of intestate inheritance, would be entitled to succeed him. If, now, the will of Titius never had any force, or had lost its force at the time of his death—if at this time there are causes which make it legally certain that no one can be heir under the will—then Aulus (the intestate successor) becomes heir the very instant that Titius expires. It might be long before

he ascertained his rights and entered upon them; still he would be considered as having had them from the death of Titius. Or he might survive Titius only a few hours; still the inheritance was his of right, and, if he signified his acceptance, became fully vested in him, so that the question now would be, not who was heir of Titius, but who of Aulus. The case was quite different, if the will of Titius had any force at the time of his death, and only failed from causes which arose afterward, as from the non-fulfilment of a condition which had then a chance of being fulfilled, or the non-acceptance of a testamentary heir, who had then the right to accept. In this case, Aulus had no claim whatever, until it became legally certain that there would be no heir under the will; till then he had hopes and possibilities of inheriting, but no right of inheritance. The period of suspense might last for months or years; Aulus might die in the course of it, not having gained any such right for himself or his successors. It might even chance that when the failure of the will was at last determined, the person nearest of kin to the deceased was a person who had been born after his death. I mention this last possibility in order to say that such a person, one born after the death of the late owner, could never be his heir. The successor, whether by testamentary or intestate inheritance, must always have had a living connection with his predecessor, that is, he must have been in ex-

istence at the same time with him. If not born before his death, he must at least have been conceived before that event. No one born more than ten months after the death of another—this being the full period of gestation recognized by ancient physiology and jurisprudence—could succeed the deceased as heir.

If, now, it is certain that a man died intestate, how is the heir to be ascertained? The Roman law, agreeing in this point with the law of all times and countries, sought him among the family connections of the deceased. But in the law-system of the Romans, the family was founded on the *patria potestas*; it included only those persons who would have been under the power of the same common ancestor, if his life had continued to their time. We must here recall the definitions and principles set forth in our sixth lecture. The name cognates, as we saw, was applied to all persons who were connected with each other by the ties of blood, that is, to all persons who could trace their descent to a common ancestor. Whether the common ancestor was male or female, whether any of the connecting links were male or female, made no difference. If two persons were connected as parent and child, grandparent and grandchild, and so on—that is, if one was ascendant or descendant of the other—the cognation was direct, or in the direct line; otherwise it was collateral. The degree of cognation between two persons was determined by the number of steps which must be

taken in tracing the connection between them. From parent to child is one step; this is the first degree of cognation. From grandparent to grandchild are two steps; this is the second degree. But brothers and sisters are also related in the second degree; for starting from one of them, as A, a first step brings us to the common parent, and thence a second step to B, brother or sister of A. Here, of course, the relationship is collateral. So uncle or aunt stands to nephew or niece in the third degree; for here the common ancestor is parent to the former and grandparent to the latter: three steps, therefore, are necessary in passing from one to the other. First cousins are in the fourth degree; the common ancestor is grandparent to both parties, two steps removed from each of them; four steps then must be taken in passing from one to the other. Of cognates as such the early Roman law made very little account; its attention was mainly given to one class of cognates, the so-called agnates, persons who could trace their connection with each other through males alone, persons descended through father, grandfather, great-grandfather, etc., from a common male ancestor. Such persons would all have the family name of that ancestor; such persons, if the life of that ancestor had continued to their time, would all have been subject to his *patria potestas*. The whole number of these persons living at any one time formed the agnate family. It must be remembered, how-

ever, that persons brought into a family by adoption, obtained the same rights of agnation as if they had been born in that family; and on the other hand, that persons who passed out of a family, either by emancipation which made them independent, or by adoption which brought them under a new *patria potestas*, lost all the rights of agnation which belonged to them by birth. An emancipated son was no longer the agnate of his own brothers. If the emancipated son had a child born before his emancipation and another born after it, the two children were not agnates of each other. A married woman, if she came under the husband's power, by the stricter marriage which prevailed in earlier times, was an agnate of his family, being treated as if she were his daughter. But under the freer kind of marriage, which was already prevalent at the close of the republic and ere long became universal, the wife was not an agnate either of her husband or of her children.

Now, by the early civil law, the law of the Twelve Tables, cognates as such, cognates who were not also agnates, had no rights of mutual inheritance. If a man died intestate, he was succeeded by his *sui heredes* (own heirs, heirs dependent on himself), that is, those who had been under his paternal power and were made independent by his death. These divided the estate equally among them, sons and daughters sharing alike. If there were children of a deceased son,

they received and divided among themselves the portion which would have come to their father in case he had lived. Children of a deceased daughter did not come into the account, for they were not in the same agnate family, nor under the power of their mother's father.

If there were no *sui heredes*, no descendants under the power of the deceased, his estate went to the nearest collateral agnate. "What," you may ask, "could not his own father or mother inherit from him?" His father could not by the strict civil law; for either the deceased had remained under the father's power, in which case he had not been able to acquire any property of his own, or he had been emancipated, in which case there was no agnate connection between him and his father. His mother could not, under the freer marriage, for the same reason: she was not his agnate. By the stricter marriage she was his agnate, being treated as if she was the daughter of her husband, or the sister of her son; she could therefore inherit from him, if after his father's death he had come to have property of his own; but she inherited as his sister, as a collateral agnate.

I have spoken of the nearest agnate, in the singular; but it must be understood that if there were several agnates, all equally near of kin to the deceased, they would be called to the inheritance together. Thus, if there were surviving brothers and sisters, they

would divide the estate equally among them. In this case children of a deceased brother would have no share at all, being in a remoter degree of kinship from their uncle, viz., in the third degree, while his own brothers and sisters were in the second. When there were no brothers and sisters, the way would be open for the third degree. Thus, if there were three uncles or aunts on the father's side, and also five nephews or nieces, children of a deceased brother, they would all share equally, each taking an eighth part of the estate. If there were no agnates in the second and third degrees, the way would be open for the fourth: all agnates of the fourth degree would receive equal shares of the inheritance. And so on, for remoter degrees of agnate connection. But suppose that the collateral agnates, one or more, who stand in the nearest degree of kinship to the deceased, should see fit to refuse the inheritance: not being necessary heirs, they are at liberty to refuse it. What, then, will become of it? Will it be offered to agnates of a remoter degree? No. The law of the Twelve Tables admitted only the nearest agnates. If these refused, the estate went to the *gens*, or extended group of families, to which the deceased belonged. Of course, too, if there were no agnates to be found, in any degree of kinship, the estate went to the *gens*. This succession of the *gens* is one of the *quaestiones vexatissimae*, the most obscure and disputed points in the early Roman law. It seems

to have found its application only to the patrician *gentes:* it became less and less important through the whole republican period, and is spoken of by Gaius as entirely obsolete. We need not vex ourselves about it here.

This, then, is the system, very brief and simple, of intestate inheritance, as fixed by the earliest Roman legislation: *sui heredes* in the first place; nearest collateral agnates in the second; cognates as such, those who are not also agnates, nowhere. Let us now trace the changes gradually introduced into this system. The tendency in all was to give more and more weight to cognation, natural kinship, in cases where by the strict law of earlier times it was shut out from all rights of inheritance. The first changes were made by the prætors, and were of two kinds: First, they allowed emancipated children to inherit along with those who had remained under the *patria potestas*, that is, were the *sui heredes*. Thus, if a father left five children, two of whom he had emancipated during his life, while the other three became independent by his death, they all shared alike, receiving each a fifth of his estate. But observe that only the last three were called heirs: they alone were made so by the laws, and the prætor did not presume without authority of law to make anybody heir. The other two were only *bonorum possessores*, actual holders of their shares in the estate, and allowed to sue and be sued as if they were

heirs. But, in this relief afforded to emancipated children, there was a possible injustice to be guarded against. The emancipated child, from the time he passed out of the father's control, had been working for himself: the *suus heres* during the same time had been working for his father; his earnings had served to swell the value of the father's estate, and thus increased the portion which fell to his emancipated brother. The latter, in effect, received a share in the acquisitions made by the *sui heredes* since his emancipation. To offset this, it was only just that he should allow them to share in his own acquisitions; and this the prætor compelled him to do. There was a *collatio bonorum* (a bringing together of goods), the property of the emancipated being brought into common stock with the father's estate, to be shared among all the children. But the innovations of the prætor went further than this. In the second place, he gave to all the cognates a chance to inherit. If there were no *sui heredes*, no emancipated children, no collateral agnates, or if the nearest refused the inheritance, the prætor called in the cognates according to their degree of kinship: if the first degree failed to receive it, calling in the second; if the second failed, then the third; and so on, as far as the sixth degree, or that of second cousins; beyond this the prætor did not go. The persons thus called in were not designated as heirs, any more than were the emancipated children: they had

no *hereditas* (inheritance), but only a *bonorum possessio*, with the practical rights and privileges of heirs. You will observe, however, that the nearest cognates, the mother, the mother's brother and sister, the sister's child, etc., though no longer absolutely excluded, had yet a very poor chance for the succession. If an only child, who by his father's death had just come into a large property, died himself without a will, the nearest agnate, though he were only a fourth or fifth cousin, could shut out the widowed mother from all share in the estate which had belonged to her husband and child. So, if a woman died intestate, leaving infant children, her agnate ten degrees removed, if there were none nearer, could prevent her children from obtaining the least share in any property she might have left.

It is not strange that such relations as to inheritance between the mother and her children should come to be regarded as inequitable. Special statutes, enacted in the second century, in the times of Antoninus Pius and Marcus Aurelius, were designed to correct the evil. By the Senatus consultum Orphitianum, of the year 178, the mother's estate was given at once to her children, to be divided equally among the sons and daughters who survived her. It was only the surviving children who were considered in this measure; the issue of a deceased child, the issue sprung from a son or daughter who did not survive the mother, were

not admitted to the inheritance. Nearly two centuries elapsed before these also were brought in to the succession, so as to take the part which the parent by his premature death was prevented from receiving. Again, by the Senatus consultum Tertullianum, passed in the year 158, twenty years before the Orphitianum, the mother obtained a new and better right of succession to a deceased child. She did not, indeed, obtain the first right. She was liable to be excluded by children of the deceased, if there were any living; or by the father of the deceased, but this only in exceptional cases; or by brothers and sisters of the deceased, if there were any from the same father: if there were only sisters the mother was allowed to share with them. Before all other agnates she had an undisputed preference. It is important, however, to observe that these privileges were not conferred upon all mothers. The Senatus consultum Tertullianum belongs to a remarkable series of laws, the object of which was to encourage and promote the increase of population, and thus to supply that dearth of men, of citizens, which was a great, growing, and threatening evil of the empire, and of which it died at last by a kind of starvation. It was only the mother who had borne three children that could claim the advantages offered by the Senatus consultum; or (as I should rather say) the one who had borne children three times, for twins were of no more avail here than a single child. If the

mother was a freedwoman, more was required of her: she must be able to count four confinements instead of three. It was not uncommon, however, for the emperors by special act of grace to bestow the same privilege of succession on women who had not acquired the right given by three or four children (the *jus liberorum*). Justinian abolished the requirement altogether, so that the mother of a single child had the same right of inheriting from that child as if she had given birth to two or three others.

The Corpus Juris Civilis, as at first promulgated in the year 534, retained the alterations made by prætors and emperors in the system of intestate inheritance, and added to the number by new alterations of its own. The general effect was to increase yet more the weight given to cognation or natural kinship, as opposed to agnation. Still agnation retained an importance which was no longer justified by the ideas and feelings of the time. The whole system had now become very complex and intricate, depending as it did on two different principles, one of which had been allowed to encroach on the other, without any real harmony being established between them. By these considerations, we may presume, Justinian was led only nine years later to take up the whole subject again and to give it an entirely new shape. In the 118th of his Novels, he set forth a remodelled system of intestate inheritance. As this has had an extensive in-

fluence on the laws of modern Europe, it may be well to give a brief account of it. Agnation was now wholly discarded, and replaced by cognation as the basis of the new structure. The possible heirs were divided into four classes.

The first class consisted of the descendants, children, grandchildren, great-grandchildren, etc. But grandchildren could never inherit unless the child from whom they came was already dead; great-grandchildren could not inherit unless the child and grandchild from whom they came were both dead, and so on. That is, no one could inherit as long as there was any living person before him in the line of descent. The principle of representation, as it is called, was admitted here to the fullest extent. If any descendant had died, he was represented by his surviving issue, who succeeded to the right which would have been his, if he had lived. Thus suppose that the deceased had four children, A, B, C, D, that C and D died before him, but that of C there is surviving issue. The estate then would be divided into three equal parts, two for A and B, and one for the descendants of C. Suppose now that the living descendants of C consist of three children M, N, O, and two grandchildren X, Y, by a deceased son P. The last third of the estate would then be divided into four equal parts, of which M, N, O, would receive one each, and the remaining one would be shared by X and Y: X and Y would

thus obtain, each of them, a half of a fourth of a third, that is, a twenty-fourth part of the whole estate left by his great-grandfather.

The second class of heirs, called on if the first was wanting, consisted of the nearest living ascendants, with the brothers and sisters of full blood, and the children of deceased brothers and sisters. The nearest ascendants and the brothers and sisters share alike, an equal share to each person, while the children of a deceased brother or sister take the share which would have come to the parent if living. Thus suppose that the nearest ascendants are A and B the father's parents, C the mother's mother; and that with these there are found a brother M, and two children X and Y of a deceased sister. Here the estate will be divided into five parts, one for each of the three grandparents A, B, C, one for the brother M, and one for equal division between the sister's children X and Y. The principle of representation was admitted here for children of brothers and sisters, i. e., for nephews and nieces of the deceased, but it was not carried any further: grandchildren of brothers and sisters, grandnephews and nieces, could only come in among the fourth class of heirs. It is also to be noted that if there were only ascendants, without brothers and sisters or their issue, the estate would be divided equally between the father's line and the mother's: in the case supposed, A and B, the father's parents would take half the es-

tate, and the remaining half would go to C, the mother's mother.

The third class of heirs, called in when the first two were wanting, consisted of brothers and sisters of the half-blood, with the children of deceased half-brothers and sisters. Here again, the principle of representation was carried no further: the grandchildren of deceased half brothers and sisters could not inherit in this class, but must find their place in the following one. Evidently, too, the class itself is of quite subordinate importance as compared with the other three.

The fourth class, called on where the foregoing were all wanting, consisted of the nearest collateral cognates, except of course those already named, the brothers and sisters of whole or half blood and the children sprung from such. In this fourth class the principle of representation was not admitted at all. The children in no case succeeded to the right of inheritance which the parent would have had if living. Nothing was considered except nearness of degree to the deceased owner of the estate; and all persons in the same degree shared equally with each other. First came uncles and aunts, who were in the third degree: nephews and nieces were also in the third degree, but these belonged, as we have seen, to the second class, or, in case of the half-blood, to the third. Next came grand uncles and aunts, who were in the fourth de-

gree, but along with them grand nephews and nieces, i. e., brothers' and sisters' grandchildren, who (as we saw) had no place in the preceding classes; and along with these what would generally be a more numerous group, the first cousins, who were all in the fourth degree. All these, great uncles and aunts, great nephews and nieces, first cousins male and female, shared equally, each individual receiving the same fraction of the estate. Next came the fifth degree, including first cousins' children, father's and mother's first cousins, with several other relations whom it is not necessary to particularize. The prætor, we saw, confined the succession of cognates to the first six degrees. But the law of which we now speak had no such limitation. No matter how remote the degree: as long as there was none nearer, it was freely admitted to the inheritance. In this system too there was no such thing as the old *bonorum possessio* of the prætors, contrasted with the strict legal *hereditas*. All whom it admitted to succeed were alike *heredes*, civil heirs with full right in name and character. No distinction was made between persons who had remained under the *patria potestas* of the deceased, and those who had passed out from it by emancipation or by adoption into other families. No distinction was made on the ground of sex: the estates of men and women deceased were divided on the same principles, and males and females standing in the same degree of kindred to a deceased

person were allowed to share alike in the inheritance. Nor was any distinction made on the ground of age. Indeed, from first to last we find no trace of primogeniture in the legal ideas and habits of the Roman people.

As to primogeniture in the common law of England, it seems to have sprung up with the development of the feudal system: it was favored certainly, if not absolutely required, by the conditions of feudalism. Not less favored by feudal interests was the preference of male heirs and stocks before female, which is another prominent feature of English inheritance; we have reason, however, to believe that this preference for male succession, unlike primogeniture, was among the primitive usages of the Germanic tribes, before their conquest of the Roman Empire. If on these points we recognize the superiority of the Justinian system, we must admit that in another point, in the consistency with which the successive classes of intestate heirs are constituted, the advantage lies with the English law. And in speaking thus of the English law, it is real estate that I refer to, the inheritance of land with its appurtenances; as to the personal property of intestates, the English rules for its distribution are comparatively recent, and are evidently founded on civil-law principles. But for real estate, the English law, which in this respect appears to have only kept up the primitive Germanic usage, calls first the de-

scendants of the deceased himself; next the other descendants of his father, those who are not also *his* descendants; next the other descendants of his father's father (i. e., his paternal grandfather), those who are not also his father's descendants; and so on, each new class bringing in descendants of an ancestor one degree more remote than the preceding. And in every class the principle of representation, by which children of a deceased parent come in as his representatives for the right which he would have had if living—this is carried out to the fullest extent. Now, the Justinian system agrees with this for the first class, the descendants of the deceased himself. It agrees also in great part for the second class, where it calls in the other descendants of the father, the brothers and sisters and the children of brothers and sisters. But here it stops short in the path which consistency should have caused it to pursue: it does not call in at the same time the grandchildren and remoter descendants of brothers and sisters. The same inconsistency appears again in the third class, in relation to the descendants of half brothers and sisters. Beyond this point, the Justinian system takes up a new principle, that of nearness in degree, which excludes representation, and produces a series of classes which stand in no natural or symmetrical relation to the preceding. It may be said, however, with justice, that the defect here is little more than a want of logical consistency; there does not

seem to have been any thing unjust or oppressive in its practical working.

The subject of the next lecture will be *testamentary inheritance.*

LECTURE XII.

LAW OF INHERITANCE (CONTINUED).

TESTAMENTARY INHERITANCE established later than intestate, yet in primitive times. Romans eminently a will-making people. First testaments made *calatis comitiis*, at semi-annual meetings of the *curiae*, hence confined to patricians; and *in procinctu*, before army marshalled for battle, where plebeians also could make them. Both these early superseded by *testamentum per aes et libram*, in form (Lecture IV.) a sale of the estate by mancipation to a *familiae emptor*, who at first was the appointed heir: this testament might be oral, and in later times became exclusively so. But the prætors gave force to a written testament, made without form of mancipation, only sealed by seven competent witnesses. Under Justinian this was the ordinary form, but the witnesses must also subscribe; so, too, the testator. The transaction must be uninterrupted, before witnesses assembled for the purpose and free from the *potestas* of testator or *familiae emptor* (and, by Justinian law, of *heres*).

No man wholly deaf or dumb could make a will, until Justinian's time. No alien could make one or receive by one. A slave might receive by one, but only for his master: by his master's testament he might receive inheritance with freedom (Lecture XI). Unable to receive by will were also corporations (exceptions in favor of municipal bodies, some temples, Christian churches, and monasteries, etc.), and other uncertain persons; but these last Justinian admitted, if at opening of the will they had become certain; thus especially *postumi alieni* (other people's children born after date of will). Excluded from Justinian's system were the *lex Voconia* (169 B. C.), forbidding inheritance of women to large estates; as well as the *lex Julia* and *lex Papia Poppaea* of Augustus's time, the former forbidding unmarried persons to receive any thing by will, the latter forbidding married but childless persons to receive more than half

the inheritance, unless in each case the testator was a near relative (within sixth degree). To escape the last-named law a woman must have the *jus trium liberorum* (Lecture XI).

A testator might appoint a succession of persons, each to be heir if the preceding ones failed to become so (*substitutio vulgaris*); and he might appoint a person to be heir of a surviving child, if the latter should die before puberty (*substitutio pupillaris*).

In early times a testator could disinherit his child by simple omission from his will. By later law, any descendant (including *postumi sui*) who by intestate inheritance would receive a share, must have express mention in the will. And as early as Cicero's time, such a descendant who without good ground received nothing in the will or less than his due part (fixed, at length, as the quarter of his intestate share) could overthrow the will as *inofficious;* but not if he had in any way recognized its validity, nor if any other remedy was open to him. Similar right of a parent over the will of his child.

Legacies.—Broad distinction between heir and legatee; yet legatee must be a person capable of heirship. Legacies always beneficial. Must be preceded by appointment of heir. Could be created in four ways, with subtle differences of effect. Always failed if the appointed heir refused to serve, as he naturally would when the legacies exhausted the estate. This danger removed (after a Furian and a Voconian law) by a Falcidian (40 B. C.), which limited legacies (by proportional reductions, if necessary) to three-fourths of net value of the estate, leaving at least one-fourth to the heir.

Fideicommissa, freer form of legacies, which sprung up in later republic, originally mere recommendations to the heir (committed to his faith), but from time of Augustus enforceable by law. Free from almost all restrictions: could be made in any part of will, or separate from will, or when there was no will; in favor of any person, and in any amount consistent with claims of creditors. But afterward confined to nearly the same persons as legacies were, and limited by the Falcidian fourth of the heir. At the same time, legacies were gradually made freer, and in the Justinian system differed little from *fideicommissa.*

It can hardly be doubted that intestate inheritance is older than inheritance by testament. In patriarchal times, it must have been the recognized authoritative usage, that when the patriarch (the *paterfamilias*)

died, his property passed into the hands of the children whom he reared and ruled during his life, and who became independent by his death. In strictness, it never had belonged to him individually: it was the common property of the family, which he as head of the family had under his control; which, after he was gone, would naturally continue to be property of the family under the control of its new heads. If there were no children, it would be hardly less natural that it should go to brothers of the deceased, who had once had a joint interest in it, when they were all under the control of their common father. To interfere with arrangements thus recommended by reason and custom would scarcely be thought of by the property-owner of primitive times. And if any one wished it, he would scarcely be allowed to alter the natural course of succession, and defeat the just claims of his family. But as regards the division of his property among the members of his family, his wishes would be respected and followed. If, in prospect of death he expressed his desire that one child should have a house, another a piece of land, another a herd of cattle, or that one child on account of greater needs should have a larger share than the rest, or that this or that gift should be made out of the estate to persons having special claims on his friendship and bounty, his children would be prevented by natural piety and by the sentiment of the community around them from neglecting such

recommendations of the father. The custom thus established would at length receive the sanction of law: the usage freely followed by most would become a rule imperative on all.

The right of the *paterfamilias* to regulate the disposal of his property by a binding will, was received in Rome long before the code of the Twelve Tables. And during the later times, when the Romans are best known to us, they were eminently a will-making people. For a well-to-do man to omit the making of his will and leave his estate to the chances of intestacy was almost looked upon as a discreditable neglect. It should seem, however, that in the earliest period the right to make a will which the law would enforce was confined to the patricians, the primitive burghers of the city. For we are told that the wills were originally made in the *comitia curiata*, the meeting of the *curiae*, the general assembly of the patrician order, to which no plebeian had admission. This body held two sessions every year, for the special purpose of hearing and attesting wills. In the presence of the assembled order, the testator named the person whom he wished to have for his heir, and stated the particular dispositions which his heir was charged to make on coming into the property. It may perhaps be assumed that wills were at first made only by persons who had no children to succeed them, that the person made heir was in fact adopted, and that the presence of the *curiae*

was required on this account; for the earliest adoption, as we have reason to believe, was always made in the *comitia curiata.* Some have supposed that the *comitia* passed a formal vote on the will presented to them, accepting or rejecting it as they thought fit. But it is hardly probable that they exercised such a power, or did any thing more than furnish a public attestation to the will. The impossibility of making a will except at the semi-annual meeting of the *comitia* must have been felt most strongly in time of war. Hence the custom arose of executing wills *in procinctu*, that is, before the army drawn up and ready for action. The army here took the place of the *comitia*, hearing and witnessing the declaration of the testator. And now for the first time a plebeian gained the power of making a valid will; but a power which he could only exercise when actually serving as a soldier against the enemy. Evidently, it was important for the plebeians that there should be some form of testation which they could use in peace as well as in war; and if the form was such that it could be resorted to on any emergency, it would be not unwelcome even to the patricians.

Such a form was in fact introduced, and was in common use before the legislation of the Twelve Tables. So popular was it that the two forms just described, the *testamentum calatis comitiis* and the *testamentum in procinctu*, passed speedily into disuse and

are only spoken of as antiquities. The new *testamentum per aes et libram* (testament by brass and balance) was in its form a sale of the estate by the testator. The ceremonial of mancipation employed for this purpose we had occasion to describe in the fourth lecture. As in every case of mancipation, there must be present, in addition to the parties themselves, five men as witnesses, with a sixth man as *libripens* (or balance-holder), all Roman citizens of full age. The person who was to receive the inheritance appeared in this transaction with the name and character of *familiae emptor* (purchaser of the estate). Touching the balance with a piece of brass (a copper coin), the symbol of the purchase-money, he addressed himself to the testator, and claimed the testator's estate as purchased by him with this brass and brazen balance. The testator then, admitting the claim, set forth the directions which he wished to have carried out in the distribution of his property. These directions were in effect conditions of the sale, and the other party, in receiving the estate as purchaser, bound himself to fulfil them. This *familiae emptor* made no use of his right during the life of the testator, whose death was in fact an implied condition of the sale; but when the testator was dead, he became invested with the ownership, and then proceeded to discharge the trusts confided to him. In the course of time, however, it became customary to name an heir distinct from the *familiae emptor*:

the latter was thus reduced to a mere actor in the ceremony, without any actual right or duty beyond it. The will, with its nomination of an heir and all its directions for the disposal of the property, was usually drawn up in writing; and the testator, when the mancipation was effected, holding up the written document, said to the witnesses: "These things, as they stand written in these waxen tablets, I so grant, so leave, so bequeath, and so do you, Romans, bear me witness." It was never required, however, that the will should be in writing. The testator, using the form *per aes et libram*, could declare orally whom he would make his heir, and what directions he would lay upon him; and this oral will was not less valid than a written one.

The *testamentum per aes et libram* was still in common use when Gaius wrote, in the second century of our era. But with it there was another and less formal kind of testament, which had been introduced with the sanction of the prætors at some uncertain time in the republican period. It was a written will; but in making it the formalities of mancipation were wholly dispensed with. The written document must be sealed with the seals of seven witnesses, a number evidently derived from the five witnesses of the mancipation-testament with the *libripens* and the *familiae emptor*. In both forms, the testator must have present with him in the transaction seven persons who could

authenticate it by their testimony. The seals of the witnesses were so affixed to the tablets of the will, that this could not be read without first breaking the seals. The prætor, however, did not presume to give the name of heir to the successor appointed in such a will: only a will recognized and sanctioned by law could create an heir. The successor named in a prætorian will was a mere *bonorum possessor* (holder of the property): the prætor gave him the *bonorum possessio*, and allowed him to sue and to be sued as if he was heir.

The prætorian testament continued to be used till late in the period of the empire; and so did the testament *per aes et libram*, though not without considerable changes and simplifications. In the time of Theodosius, a century before Justinian, it had given up the *libripens* and *familiae emptor*, retaining only the five witnesses, and was employed solely for oral wills: written wills were then always executed according to the prætorian form. Theodosius himself insisted that there should always be seven witnesses; and for the written wills he added a new requirement, which Justinian also retained, the subscription of the witnesses. This may have been customary before, but it had not been necessary. The witnesses had been required only to set the impress of their seals on the wax used in fastening up the document. Now they were also to write their names upon it. They must do this on the inside, on the same face which contained the writing of the

will. If the testator wished to keep his dispositions secret, he had only to roll up the parchment or papyrus so as to leave nothing but blank space exposed at the bottom. Here the witnesses subscribed their names; and the testator himself subscribed with them, if the will had been written by any other hand than his own. If the testator was unable to write, an eighth witness was called in to give his attestation and subscription. The will was then closed up, and sealed on the outside with the seals of the witnesses, who again wrote their names on the outside, each one by his own seal. The Institutes are careful to say that in the process of sealing all the witnesses might use the same seal-ring, and if this was a seal-ring which belonged to none of them, but was borrowed for the occasion, it made no difference in the validity of the act. This, under the legislation of Justinian, was the established and ordinary mode of attesting wills. At the same time, however, oral wills were still allowed, the testator setting forth his wishes at length in the presence of the seven witnesses convened for the purpose. There were also public wills, which, being attested by some official act, were exempt from the formalities before described: thus where a will was presented to a judge and civic council, and placed upon the city records, or was submitted by petition to the emperor.

In regard to the witnesses who gave their attestation, it was necessary that they should be assembled

for this especial purpose: if they were already brought together for some other object, they must at least have distinct notice that they were now to give themselves to the execution of a will. The transaction once commenced must be carried through without interruption. If suspended for any other act or business, it must begin again *de novo*, as if nothing had been done before. No person under the *patria potestas* of the testator was allowed to be a witness to his will. Such a person would naturally have his own expectations of the inheritance; and whether those expectations were or were not realized by the will, he would in either case have an interest and be subject to a temptation that might make his testimony appear less worthy of reliance. Similar objections would lie against persons under the *patria potestas* of the heir. Hence, as the *familiae emptor* had originally the place and character of heir, no person under his *potestas* was allowed to be a witness. It is a curious circumstance, and one that shows the tenacity of forms among the Romans, that this prohibition remained when the *familiae emptor*, having ceased to take the inheritance, had become a mere figure-head, without personal interest in the will. In form, he was still a principal in the transaction, the purchaser in the symbolic sale of the estate. In form, the heir created by the will had no part in that transaction. Hence, not only persons under the power of the heir, but even the heir himself, might

act as witness. The jurists felt that this was unbecoming; they advised the heir with those under his power not to exercise this right; but they had to acknowledge that it was a right which nothing in the law restrained them from exercising. But Justinian, who completely discarded the old form of mancipation, swept away also this remaining effect of it: he made it the rule that neither the heir himself nor any one subject to his power should be witness to the will.

Another consequence flowing from the old mancipation process was the inability of a deaf man or a dumb man to make his will. The testator in this process must hear the words of the *familiae emptor*, and he must pronounce certain words of his own. The deaf man could not do the first, the dumb man could not do the last: they were held, therefore, to be physically disqualified for making a will. The disability did not fall upon those who were simply hard of hearing or stammering in speech, but only upon those who were wholly without the power of hearing or speaking. Such persons might have all the physical capacity required for executing a written will; but for centuries they were not allowed to execute one. Justinian at length relieved them from this inequitable rule: it was only required that they should have the ability to understand what they were doing, the ability to make an intelligent disposal of their property. To those who were deaf-mutes by birth this condition was

wanting: the means had not yet been found for letting in light upon their darkened minds: they were still excluded by necessity from the privilege of which we are speaking.

Other incapacities call for a brief mention. Only the Roman citizen could execute a valid testament. The *peregrinus* (or foreigner) could neither make a will appointing an heir to his own estate, nor could he be appointed by will heir to the estate of another: he could not receive even the smallest legacy. This was one of the most serious disadvantages of his alien condition. A slave might be appointed heir, but if he remained a slave he could not accept the inheritance without his master's consent, and he acquired it then not for himself but for his master. A man might appoint his own slave as heir, but, to make the appointment effectual, it must be accompanied by a direction that the slave should become free on the master's death: Justinian ordered that such a direction, bestowing freedom, should always be understood when a slave was appointed heir by his own master. The slave thus appointed was a necessary heir, having no power to refuse the inheritance.

We have now to speak of those who could not be appointed heirs.

How firmly the Romans held their conception of an heir as the definite personal representative of his predecessor, we have already seen. It is not surprising

that they should have found something incongruous and unnatural in the idea of a man making a corporation his heir. Not only did the corporation seem to them something essentially different from the individual, and thus ill-fitted to represent him; but the corporation is composed of ever-shifting elements, so that the testator in appointing it could not have that definite intention as to the persons who should succeed him, which the Romans looked upon as indispensable. For a long time, corporations were held to be incapable of taking property by inheritance, or even by legacy. But, in the period of the empire, exceptions began to be allowed. The manumitted slave of a municipal body, a city corporation, might be appointed heir, and thus a right of succession acquired for the municipality itself. In regard to certain divinities, as Tarpeian Jupiter, Apollo of Didymi, Minerva of Ilium, Diana of Ephesus, etc., it was permitted to institute them as heirs, the inheritance of course going to their temples. This latter practice, however, seems not to have been carried to any great extent: from the grievous burden of the dead hand, of vast tracts held in mortmain, heathen Rome was always exempt. Under the Christian emperors and in the Justinian system, churches, monasteries, pious foundations of every kind, as well as municipal bodies, received the right of inheritance. Other corporations, if they wished to have it, must obtain it by special concession of the government.

The Romans never required that the testator should be actually acquainted with the person whom he made his successor; but it seemed to them that he ought to have a definite conception as to that person, to know who it was that he was bringing into this intimate and confidential relation. Hence the appointment of an uncertain person was looked upon as invalid: such an appointment as "Let him be my heir who shall come first to my funeral," or "him who shall give his daughter in marriage to my son," or "those who after my death shall first be made consuls." Even a legacy couched in such terms was invalid. Gaius, however, tells us that in his time an appointment of this kind was allowed, if the designation was of a more precise and restricted character, thus: "Of my cognates now living, if any one shall marry my daughter, let him be my heir." The tendency shown in this more liberal interpretation appears to have gained ground; for Justinian set aside the rule itself. An inheritance or legacy could now be left to an uncertain person; it was only necessary that the uncertainty which existed when the will was made should be converted afterward into a certainty, that a person should be found to whom and to whom alone would apply the indefinite description of the will.

Among uncertain persons—those of whom the testator could have no definite conception—were the posthumous (Latin *postumi*), in the more general sense of

that word, the sense in which it would include all persons yet unborn when the will was executed. Persons who were both conceived and born after the testator's death were excluded from inheritance by another rule, already alluded to, which required that the heir should be in the world, should have existed, at the same time with the testator. But persons born or conceived during the testator's life, but subsequently to the making of his will, were excluded by the principle of which we now speak, as being at the time of the testament uncertain persons. Thus, the testator could not say, "If my brother Seius shall have a son born before my death or within ten months after it, let that son be my heir." The son of Seius, if any should be born, would not be allowed to inherit; for the will was invalid from the first, and no subsequent event could give it validity. An exception, however, was made in favor of children (the *postumi sui*) who might be born to the testator himself. When the will said, "If any children shall be born of my wife Sempronia while I am living or within ten months after my death, let them be heirs," this was a perfectly valid appointment. In fact, such a clause, as we shall see presently, might be essential to maintain the force of the will. And as regards the *postumi alieni*, Justinian, who, as we just saw, allowed the institution of other uncertain persons, set aside the rule which forbade their institution.

The Voconian law, passed during the later repub-

lic, 169 B. C., imposed a restriction on the institution of women. It applied only to large estates. A person whom the census placed in the first class, as having a rated property of at least one hundred thousand *asses* (i. e., one thousand dollars, which in purchasing power was worth as much as ten thousand now), such a person was forbidden to appoint a woman as heir. This is the law to which, in Cicero's treatise on "Old Age," the elder Cato represents himself as having given a strenuous support. "When at the age of sixty-five years," he says, "with loud voice and good lungs I urged the passage of the Voconian law." The alleged design of the statute is said to have been to restrain the growing luxury and extravagance of women, by withholding from them the means of being luxurious and extravagant on a large scale. It can hardly be supposed, however, that this was the principal reason for the measure. A stronger reason must have been the desire of the wealthy class to keep large estates in the families, the agnate families, to which they belonged; if such an estate became the inheritance of a woman, it was apt to pass by her marriage into another family. It would seem that under this law, while a woman could not be heir to a large estate, she might still receive a portion of it by legacy, though not to the extent of more than half the estate. The Voconian law had no place in the system of Justinian.

The incapacity for inheritance, which during sev-

eral centuries attached to unmarried and childless persons, was of a different character. Such persons could always inherit from the will of a near relative, of one who stood within the sixth degree of cognation, as near (that is) as second cousin. The disability which they were under related only to the wills of strangers, of those not connected with them by blood, or not so nearly as the sixth degree. Even in such a will, the unmarried or childless person could be appointed heir, and the appointment was not invalid. But if the person so appointed was not married at the death of the testator, or within a hundred days after it, he could not take any part of the inheritance. If at the death of the testator he was married but childless, he could take only half of the inheritance. The laws which established these disabilities, the Lex Julia in reference to the unmarried, and the Lex Papia Poppaea in reference to the married but childless, were enacted in the reign of Augustus, and were among the most important in that series of imperial laws, to which I referred in the last lecture, as designed to promote the increase of population. It must be observed, however, that the laws of which we here speak did not apply to a man under twenty-five years of age, or a woman under twenty: persons younger than this might be married, but it could not fairly be expected or required that they should be. Nor did they apply, as originally enacted, to a man over sixty years of age or a woman

over fifty. But a Senatus consultum in the reign of Tiberius ordained that those who remained unmarried to this age must be treated as celibates ever after: no subsequent repentance or amendment could save them from the penalty of their prolonged celibacy. This extreme rigor was again relaxed by a Senatus consultum of later date: the man of sixty years or upward might escape the disability, if he married a wife who was under fifty. A corresponding privilege for the woman of fifty years or upward who married a younger man, the law was not gallant enough to allow. Another distinction between the sexes, and one which bore yet harder upon women, was made by the original law. To escape the yoke of the Lex Papia Poppaea, and enjoy full right of inheritance, it was only necessary for the married man that he should have *one* child, and even this might be one whom he had adopted. For the married woman it was necessary that she should have borne children three times (or, in case of a freedwoman, four times), the same condition which was required by the Senatus consultum Tertullianum in order that a mother might inherit from her child. The status which we are describing applied to legacies as well as inheritances; and all estates or parts of estates which the appointed heirs or legatees were by these statutes prevented from taking, went to the *fiscus* or treasury of the empire, to which they must have been the source of a not inconsiderable revenue. But

the ascendency of Christianity was fatal to these laws. A legislation which held out prizes to marriage and childbearing was repugnant to the spirit of a religion which favored monasticism and attached the idea of peculiar sanctity to a virgin life. The century which saw the accession of Constantine saw the whole system of the Julian and Papian laws swept away.

To a testator making his will it must always seem doubtful whether the person whom he most desired for his heir would actually receive the inheritance. If there was nothing else to throw doubt on the event, the uncertainty of life must do so, the possibility that the appointed heir might die before the opening of the will. Hence it was very common to name substitute heirs, who should take the place of the one first named, in case he failed for any reason to take the inheritance. There might even be a succession of these substitutes, one after another, to any extent. Thus, "Let Aulus be my heir; if Aulus shall not be heir, let Maevius be heir; if Maevius also shall not be heir, let Seius be heir," etc. Here, too, the testator might, if he chose, put two or more persons in any rank as joint-heirs. Thus, "Let Aulus and Decimus be my heirs; if they shall not be heirs, let Maevius, Publius, and Sempronius, be heirs; if they also shall not be heirs, let Seius be heir," etc. Here the estate would pass first to Aulus and Decimus; if either failed, the other would receive the whole; if both failed, the estate would go to

Maevius, Publius, and Sempronius, each receiving a third; if one failed, the other two would receive each a half; if two failed, the remaining one would take the whole; only when all three failed, would the estate go to Seius. If the testator doubted the solvency of his estate, and apprehended that no one would be willing to accept it, it was common for him to close the series of substitutes with a slave of his own, who along with the inheritance would receive his own freedom. The person so appointed had no power to refuse: he was a necessary heir. If the estate had to be sold for the satisfaction of the creditors, the infamy would fall on him and not on the memory of the testator; but for this the advantage of being a freeman was an abundant compensation. To this custom we referred in the last lecture.

The substitution thus far described was called vulgar (i. e., ordinary) substitution, in order to distinguish it from another and less frequent kind of substitution by will, the so-called pupillary substitution. If a father when he died left a child in tender years, the child would be for some time a *pupillus* (or ward), unable to make a will, to appoint an heir, for himself. The father, therefore, was allowed in his will to appoint an heir for his child, in case the latter should die in this condition of pupillage. In this case the father made a will, not for himself only, but for the child that survived him, naming a successor for the child, if he

should die in the condition of *pupillus* (or ward). If the child lived on to the age of puberty, when he could make a will for himself, the appointment made by the father, the pupillary substitution, lost its effect.

Under the primitive system of the Roman law, as set forth in the Twelve Tables, a testator had full power to disinherit his own children, one or all; and he could do so, without saying any thing about them, by merely naming some one else as heir. We must not infer from this that testators in those times were wont to set aside their children often, or for slight causes. The proper inference would be precisely the opposite. It was because the power was rarely exercised, or at least rarely abused, that it seemed unnecessary to restrict it by law. At length, however, the feeling arose, and before the fall of the republic it had found legal expression, that a testator must at least mention his children; that if he wished to disinherit them, he must say so in his will. The presumption always was, that he meant them to have part in the inheritance, and this presumption was only to be overcome by his own statement to the contrary, made with due formality in the will itself. The principle may be put in this shape: any descendant of the testator, who could inherit from him if he died intestate, must have part in his inheritance or be expressly excluded by the will. Let us see now how a testator in the time of Justinian must draw his will, in order to avoid objec-

tion on this score. In the first place, he must refer by name or by clear personal description to each of his sons and daughters already born; if not, his will would be void from the beginning. Thus, "Let Aulus be my heir: let my sons Maevius, Seius, Gaius, and my daughters Cornelia and Sempronia, be without inheritance." But perhaps he has grandchildren by a deceased child; these, if he died intestate, would be entitled to share in the succession: they must be noticed, therefore, or the will would be void: thus, "Let Sextus and Publia, children of my deceased daughter Julia, be without inheritance." But even yet the will is not perfectly guarded. Children may be born to the testator after the will is made, children who would succeed to him if he died intestate, who will therefore break the will unless they are noticed in it. Of course, he cannot refer by name to children yet unborn; but he must come as near it as he can. He must say, "If any children shall be born to me before my death, or within ten months after it, let them be without inheritance." But there is still another possibility to be guarded against. If any of his children, present or future, should die before the father, their children, should they leave any, would have a right to succeed him, if intestate. Hence these also will break the will unless noticed in it. To secure himself from this danger, he must add, "If any child of mine shall die before me, let the children of that

child be without inheritance." In all these cases, the testator might appoint as heirs the persons whom we have represented him as disinheriting; but one or the other he must do, appoint them, or disinherit them in this explicit way: otherwise the will was without effect. We have supposed a testator drawing his will in the time of Justinian and in conformity with the rules of the Corpus Juris. Before Justinian the practice was somewhat different, and somewhat more complex, but we need not enter into particulars on this head. A distinction was made between sons on the one hand, and daughters and grandchildren (children of a deceased child) on the other. Sons must be treated in the manner just described, appointed heirs or expressly disinherited: if not, the will was void. In regard to daughters already born, and children of a child already deceased, it was enough to include them in a general disinherison; thus, "Let Aulus be my heir: let all others be without inheritance." Even if he failed to disinherit them in this general way (*inter ceteros*, as the Romans called it), the will was not void: the appointed heir took the inheritance, but the daughters and grandchildren were allowed to come in and claim for themselves a share of the estate. The prætorian law indeed made it necessary that grandsons should be treated like sons; but it was only by the legislation of Justinian that female descendants, daughters and granddaughters, were put on the same footing.

The requirement which we have been describing imposed no real restriction on the power of the testator: it allowed him to do as he wished, demanding only that he should state his wishes in an unequivocal manner. But the Roman law went further than this. It recognized in certain persons a natural right to share in the inheritance, and enabled them to attack and overthrow a will in which that right was disregarded. At what time this principle was first admitted is not known; but it was before the fall of the republic. If a son thought himself unjustly treated by his father's will, he could bring a formal complaint against it, as inofficious, that is, inconsistent with the *officium*, the natural affection and duty, of a parent toward his child. The theory was, that the maker of a really inofficious will had not the perfect soundness of mind required for testation. The complainant must show to the satisfaction of the judge that he had given the testator no sufficient ground for his conduct. If the complaint was sustained, the will was set aside, and the estate divided as that of an intestate person. How much the testator must give to an unoffending child, in order to be secure from the charge of inofficiousness, was at first left to the decision of the judge. But gradually the opinion became established, that it was sufficient to give him by will a fourth part of what he would obtain by intestate inheritance. Justinian sanctioned this principle, and permitted the complainant

to sue directly for the fourth part of his intestate share. He also required that a parent who disinherited his child should give his reason in the will, and that this reason should be one of fourteen which he himself enumerates. A parent also who had been passed over in the will of his child could attack the will as inofficious; and here again Justinian required that the child in his will should give a reason, one of eight which he himself enumerates, for passing over the parent. The complaint could also be made by brothers and sisters, but only where persons notoriously infamous were preferred to them as heirs. It could not be made by any one who had acknowledged the validity of the will by accepting any thing under it; nor could it be made by any one who had another remedy within his reach. Attacking, as it did, the character of the testator, it was only to be used as a last resort, where all other means of redress were wanting. It will be perceived that in most cases where a man had children, and in some cases where he had not, this institute withdrew a quarter of his property from his disposal by will, leaving him the absolute control of only three-quarters. Interference of this kind with the full right of testators is repugnant to the spirit of the English law; while on the other hand, the French law has gone further in this direction than the Roman. The Code Napoléon leaves the testator, if he has one child, only half his property to dispose of as he pleases; if he has two

children, only a third; and if he has three or more, only a quarter.

It only remains now to say something as to that part of the estate to which the testator gives an exceptional direction, withdrawing it from the dominion of the heir to bestow it upon others. I refer to the legacies. The Roman law makes a very broad distinction between the heir on the one hand (even when he is joint-heir with several others) and the legatee or receiver of a legacy) on the other; though this distinction is not so strongly marked in the later law as in the earlier. The heir represents the person of the deceased in all his property rights and obligations: the legatee has no such character: he is merely the receiver of a certain piece of property left by the deceased. The legacy was always a benefit to the legatee, a pure addition to his resources; the inheritance might be a heavy burden, a serious loss or fatal injury, to the heir. The heir might have to pay out all he received, or more than all, to the creditors of the estate and to the legatees: the legatee was not required to pay any thing either to creditors or to other legatees. The legatees were dependent on the testamentary heir: if he could not or would not take the inheritance, the will failed as a whole, and the legacies were extinguished: no obligation to pay them or to suffer their payment could be laid on the intestate heir. Legacies could be made with effect only to persons who were capable of

receiving by inheritance. In the arrangement of the will, they must follow the appointment of an heir, and must be couched in certain fixed forms of expression. Thus, 1. "To Publius I give and bequeath my slave Stichus;" or, "Let Publius have (let Publius take) my slave Stichus." By this form, Publius gained an immediate right of ownership in the thing bequeathed. Or, 2. "Let my heir be condemned to give (or, let him give, I order him to give) Publius my slave Stichus." By this form the heir was laid under obligation to Publius, to give him the thing bequeathed with good title, and, if he refused, was liable in twice its value. Or, 3. "Let my heir be condemned to suffer Publius to take my slave Stichus." By this form the heir was not obliged to give the thing, but only not to hinder Publius from taking it. Or, 4. "Let Aulus, Maevius, and Publius, be heirs: let Publius in preference take (Latin *praecipito*) my slave Stichus." The peculiarity of this case lay in the fact that Publius, the legatee, was one of the joint-heirs, so that the burden of the legacy fell upon the other two, and not on all alike. These forms were four in number, and were distinguished by other differences in practical effect; but it is not worth while to enter into the details. My principal object in describing the forms themselves was to give some idea of the technical and subtle way in which the legacies were treated, a circumstance which led, as we shall presently see, to the introduction of a freer system of bequest.

It is obvious that the legacies ordered in the will might be so numerous or so large as to exhaust the resources of the estate, and leave little or nothing for the heir. In such cases it was natural that the heir should refuse what was for him a worthless inheritance. The testament then was of no effect; the estate went to the intestate heir, and the legatees received nothing at all. It was the interest of the legatees, therefore, not less than of the testamentary heir, that the estate should not be all given away in legacies. Various attempts were made to regulate the matter by law, and a Voconian law, enacted for this purpose, was of little avail. A Furian law, of uncertain date, ordained that no person should receive by legacy more than one thousand *asses:* if any one took more than this, he should restore fourfold. But near kindred of the testator were exempt from the limitation, all those in the first six degrees, together with children of a second cousin, who were in the seventh. The restriction imposed by this statute was relaxed by the Voconian law, passed in 169 B. C., at least for testators whose rated property was more than one hundred thousand *asses.* In this no definite sum was prescribed as a maximum; but it was ordained that no legatee should receive more than the heir himself. Neither of these statutes was fully suited to the necessities of the case. A large number of small legacies might, under the first, leave nothing for the heir; while, under the second, it might

make his part so small as to seem valueless in his eyes. But a Falcidian law, passed in the year 40 B. C., put an end to the whole difficulty. This law secured to the heir a quarter of the net value of the estate; the legatees could obtain only three-quarters: if the legacies named in the will amounted to more than this, they were diminished by proportional reductions. If, for instance, ten-twelfths were given by the will, there was deducted from each legacy a tenth part of itself, making the amount nine-twelfths, and leaving three-twelfths, or one-quarter, for the heir. Few measures have accomplished their purpose more satisfactorily than the Falcidian law, which remained in force through the history of the empire, and holds an important place in the system of Justinian.

We find in the Digest mention of a will which began with these words: "This testament of mine I have written without help from any one skilled in the law, following the guidance of my own reason rather than an elaborate and painful observance of forms, and if I have put any thing in a shape not altogether skilful or rulable, the intent of a man sound in mind ought to be accepted in place of strict legal correctness." There can be no doubt that in these words is expressed the feeling of many testators. While the practice of making wills was more general among the Romans than with us, it was probably less common among them to seek the aid of lawyers in doing so. Testators left thus

to themselves would look with dread on legal technicalities: especially would the system of legacies appear to them a kind of trap, abounding, as it did, in subtleties, of which they could neither understand the nature nor foresee the effect. Often, too, they would wish to make provision for persons who were precluded by rules of law from receiving either an inheritance or a legacy. Under such circumstances they were led to throw themselves on the good feeling of the appointed heir, for making any gifts which they might desire to have made out of the inheritance. Before the time of Cicero it had become a common practice to use words of this kind: "I commit it to the faith of my heir to give Publius from my estate one thousand *asses*," or "my slave Stichus," or "Maevius as debtor" (i. e., the obligation in which Maevius was bound to the testator). Such a recommendation was called a *fidei commissum* (something committed to the faith of the heir). Originally it was a mere recommendation, carrying only a moral force, the heir being under no legal necessity to comply with it. But the Emperor Augustus was induced in repeated instances to interpose his authority, or rather to order the consuls to interpose theirs, for enforcing these *fidei commissa;* and it was not long before this enforcement came to be a uniform practice. A new prætor specially appointed for the purpose, a *prætor fidei commissarius*, was charged with this duty. The fidei

commissum was freed from all the restrictions which bound up the legacy. If made in a will, it did not need to follow the appointment of the heir, but might stand at the beginning. It could also be made outside of the will, in a separate writing, or in an oral form, of course with proper attestation. It could be made where there was no will, the obligation being then imposed on the intestate heir, whoever he might be. It could be made to any persons, and in any amount which did not conflict with the claims of creditors upon the estate. It might include the entire estate, the heir being directed to turn it over as a whole to the person named in the fidei commissum. The latter then took upon himself the duties and liabilities which properly belonged to the heir. In time, however, it was found necessary to impose some restrictions on the fidei commissum. Thus, by several successive laws, it was confined to nearly the same persons who could receive a legacy. The principle of the Falcidian fourth was also applied to it: the heir could always demand a quarter of the net value of the estate, the fidei commissa with the legacies being reduced, if necessary, so as not to exceed three-quarters. At the same time the legacies began to be treated with greater freedom, being gradually assimilated to the fidei commissa. As we find them in the Corpus Juris, there is little difference between them. That both are found there, was the result of conditions which had

ceased to exist. The *legata* and *fidei commissa* of the Justinian books are essentially the same thing, a free system of bequests, released from nearly all the technicalities and restrictions of the earlier legacies.

INDEX.

A

B

C

Q

R

S

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